TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 64.

THE SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

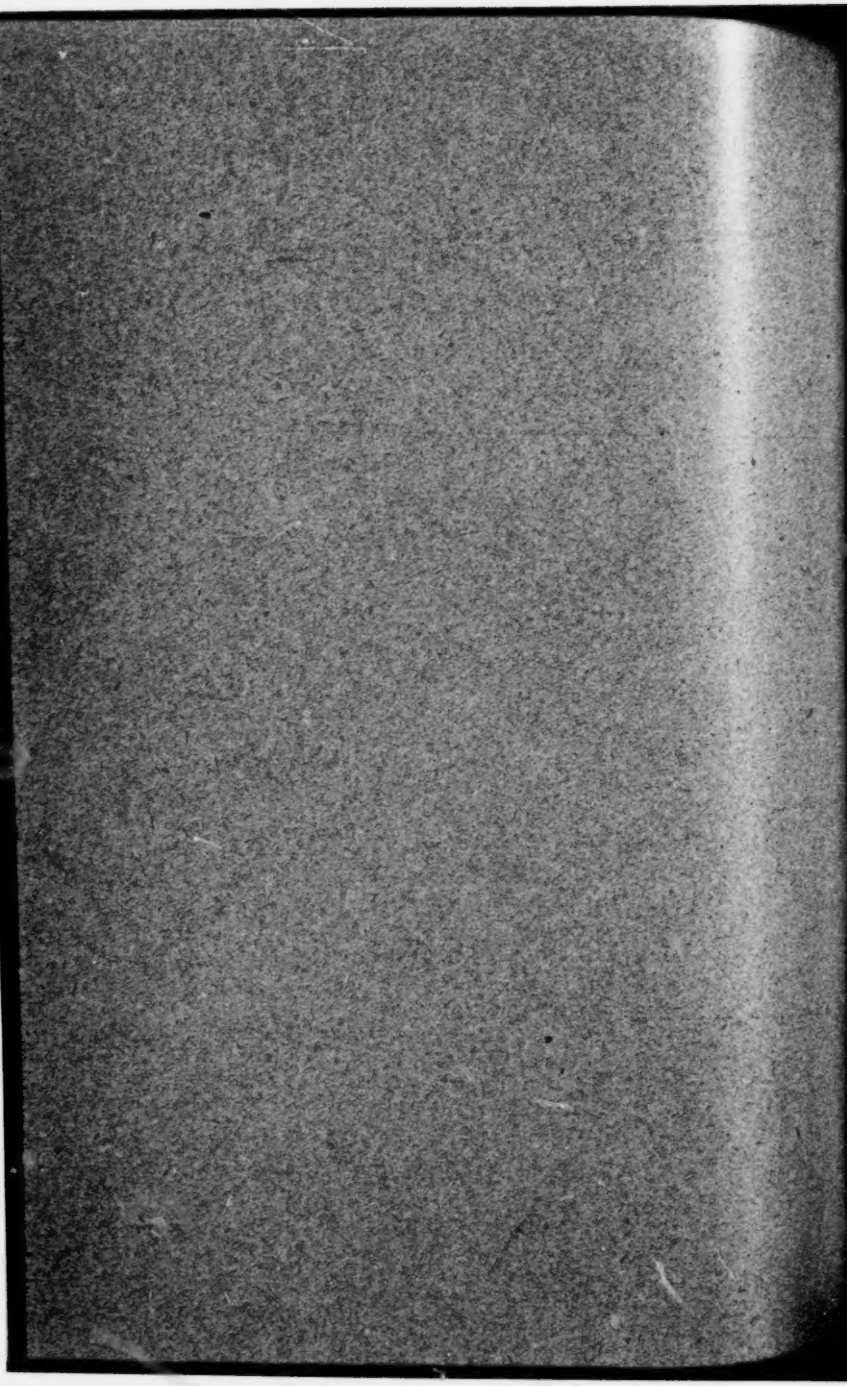
vs.

THE POSTAL TELEGRAPH-CABLE COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED MAY 22, 1899.

(17,417.)



(17,417.)

PREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 303.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY.

OR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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TED STATES OF AMERICA, *ss:*

ited States circuit court of appeals for the fourth circuit, held at the court-house, in the city of Richmond, on the lay of February, being the seventh day of the same the year of our Lord one thousand eight hundred and —present, Hon. Nathan Goff, circuit judge; Hon. Morris, district judge; Hon. William H. Brawley, dis—among other were the following proceedings, to wit:

RAILWAY COMPANY, Plaintiff in Error, *vs.* LEGRAPH-CABLE COMPANY, efendant in Error.	No. 298. Error to the Circuit Court of the United States for the Western District of North Carolina, Greensboro.

nembered that heretofore, to wit, on the 8th day of De-98, transcript of the record of the said circuit court in titled cause, with the writ of error attached, was trans-nd filed in our said circuit court of appeals here, which ws, to wit:

Transcript of Record.

STATES OF AMERICA, } *To wit:*
strict of North Carolina, }

uit court of the United States for the western district of lina, begun and held at the court-house in the city of , N. C., on the second Monday of October, being the 10th same month, in the year of our Lord one thousand eight nd ninety-eight—present, the Honorable Charles H. Si-dge of the circuit court for the western district of North nd within the fourth circuit—among others were the roceedings, to wit:

. TELEGRAPH-CABLE COMPANY *vs.* OUTHERN RAILWAY COMPANY.	No. 502. At Law.

, to wit, on June 25th, 1898, an attested copy of the rec-above-entitled cause from the superior court of Guilford C., is received, docketed, and filed in this court, at Greens-in the words and figures as follows, to wit:

Summons.

GUILFORD COUNTY:

In the Superior Court.

POSTAL TELEGRAPH-CABLE COMPANY
against
THE SOUTHERN RAILWAY COMPANY. } Summons.

The State of North Carolina to the sheriff of Guilford county, Greeting:

You are hereby commanded to summon The Southern Railway Co., the defendant above named, if it be found within your county, to appear before the clerk of the superior court for the county of Guilford, at his office in Greensboro, on the 22 day of June, 2 1898, and answer the petition which will be deposited in the office of the said clerk of the superior court of said county within ten days after the issuing of this summons. And let it take notice, that if it fail to answer said petition within the time prescribed by law, the plaintiff will apply to the court for the relief demanded in the petition. Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court this 11 day of June, 1898.

ED. L. RAGAN,
Clerk Superior Court, Guilford Co.

Endorsed: Summons for relief. Returnable on the 22nd day of June, 1898, into the office of the clerk of the superior court for Guilford Co.

Return.

Received June 11, 1898.

Served June 11, 1898, by delivering a copy of the within summons and petition to W. E. Coffin, agent for the Southern Railway Co., at Greensboro, N. C.

J. A. HOSKINS,
Sheriff of Guilford Co.,
By J. H. DAVIS, *D. S.*

Officer's fee, $1.20.

Endorsed: Filed in this office June 25, 1898. Sam'l L. Trogdon, clerk.

Prosecution Bond.

NORTH CAROLINA, }
ford County. }

POSTAL TELEGRAPH-CABLE CO. }
vs. }
SOUTHERN RAILWAY COMPANY. }

Postal Telegraph-Cable Company, principal, and A. L.
d John B. Farris, security, acknowledge ourselves to be
the Southern Railway Company in the sum of two hun-
rs. The conditions of the above obligation are such that
e said principal obligor is about to institute proceedings
erior court in said county against the said defendant
way company. Now, if the said plaintiff, the said Postal
egraph-Cable Company, shall pay the defendant railway
pany all such costs as the defendant may recover of it
ion, then the above obligation shall be void; otherwise
in full force and effect.
our hands and seals this the 11 day of June, 1898.

POSTAL-TELEGRAPH CABLE CO.,
By J. R. McINTOSH, *Agent & Att'y.*
J. R. McINTOSH.
A. L. BROOKS.
JOHN B. FARRISS.

d: Filed in this office June 25th, 1898. Sam'l L. Trog-

Petition.

NORTH CAROLINA, }
ilford County. }

Superior Court, before the Clerk.

POSTAL TELEGRAPH-CABLE CO. }
vs. } Petition.
THE SOUTHERN RAILWAY CO. }

etitioner, The Postal Telegraph-Cable Company, represents
a corporation, duly incorporated and chartered under the
e State of New York, with authority to construct, main-
operate telegraph lines throughout the State of New York,
States of the United States of America, including the State
Carolina. And by virtue of chapter 49, of the Code of
rolina of 1883, and the acts of the General Assembly of
amendatory thereof, desires to construct, maintain and
line of telegraph along and upon the right of way of the
Railway Company, from a point on the State line between
of North Carolina and Virginia, where said railroad right

of way crosses said State line, thence south through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarrus and Mecklenburg, to the town of Charlotte, in said last-named county, and from the town of Greensboro, in the said county of Guilford, to the city of Raleigh in said State, passing through the counties of Guilford, Alamance, Orange, Durham and Wake, the whole distance being about 193 miles.

4 The telegraph line, when so constructed, will connect with the telegraph lines already constructed, owned and operated by petitioner and others to be constructed, owned and operated by it, making complete telegraph connections throughout the United States of America, Canada and Mexico, with cable connections to Europe.

Petitioner represents that it has failed, on application therefor, to secure by contract or agreement the right to erect its telegraph lines upon the right of way aforesaid, and for the purpose aforesaid, with the said defendant railway company, and that it has given security for the costs of these proceedings.

That said defendant railway company extends to and runs within the town of Greensboro, in said county of Guilford, and has an agent located therein, upon whom service may be had in these proceedings, as provided for in section No. 2011 in the State Code.

Your petitioner desires to construct its telegraph line upon the west side of the line of track of said railroad from the town of Charlotte, aforesaid, to the said State line, and on the south side of said railroad track from the said town of Greensboro, in the said county of Guilford, to the city of Raleigh, in the county of Wake, and to erect its poles along the outer edge of said right of way, about four feet from the said outer edge of right of way, unless it be that at some points of said right of way, at that distance from said outer edge, there be found obstructions that will prevent the erection of said poles at such points, then, in such event, petitioner proposes to erect said poles as near said outer edge of said right of way, as can be done without interference with any other line of telegraph, or other construction on said right of way.

Petitioner represents that the said Southern railway is a single line, with its railroad bed constructed at or near the centre of its right of way, and that its track is about 4 feet 8½ *guage*, together with switches, turnouts, stations, side tracks, turn-tables, water tanks, &c., such as *is* necessary to carry on and operate a single line of railway. That the right of way of said railway is about one hundred feet wide, and extends about fifty feet from a line along the centre between the rails of said main track.

That the line of telegraph to be constructed by petitioner will be of best material, and upon the most improved plan, with poles about twenty-six feet in length, and one foot in diameter at the base, and will be firmly planted in the ground at a depth of not less than five feet, and upon such poles will be attached such suitable cross-arms about six feet in length, fastened near the top of said poles

5 with insulators thereon, upon which will be strung, at or near the upper end, wires of suitable material, and of suitable

number, so as to enable petitioner to promptly transmit all telegraphic messages entrusted to it. There will be about 35 poles to the mile.

In places where its lines cross the track, or where it is necessary to do so to prevent interference with any work, use or structure, or the operation of any trains of said railway company, petitioner's poles will be so high above the ground as to permit its wires to be suspended so far above any structure of defendant company as to prevent any interference therewith.

The said cross-arms will extend the same distance on each side of said poles. Said poles will be so erected, and said telegraphic line so constructed and maintained as not to obstruct or hinder the usual travel and business of said railroad company, nor in any way interfere with the operation of said company, nor with any telegraph line now constructed on said right of way.

In the event that said railway company shall express a desire for the location of said line at some other points on said right of way than as designated above, or in the event that said railway company shall at any time desire to change the location of its track, or construct new tracks, or side tracks, where same do not now exists, petitioner hereby agrees to remove said poles to such other points on said right of way adjacent thereto, which shall be designated by said railroad company, upon reasonable notice, and at the expense of petitioner.

Petitioner will not construct its line, or in any way attach the same, to any of the trestle-work or bridges of said railroad company, or upon any of its embarkments.

Said telegraph line, when constructed, will in no way damage the property of said railroad company, nor impair nor diminish the value of said right of way for railroad purposes, but that the same will be beneficial to said railroad company and its patrons.

The said defendant railroad company is duly incorporated, doing business by virtue of its charter with a right of way of 100 feet in width, obtained by enactments of the General Assembly of this State for railroad purposes alone.

Petitioner does not desire by these proceedings to secure the fee to any part of the right of way of said defendant railroad company, but only to obtain the right to construct, maintain and operate over, along and upon said right of way of the said railroad company, a telegraph line as aforesaid.

6 Your petitioner prays for the rights and privileges hereinbefore enumerated for the *bona fide* purposes of obtaining said easement and right of way, in order to erect, maintain and operate the said telegraph line for the benefit and accommodation of the general public, and prays that a copy of this petition, with notice of time and place, be served upon the defendant, when the same will be presented to the superior court, at least ten days prior to the presentation of same to this court, and that such proceedings may

be had, and orders made and judgments entered as are in such cases provided for by statute, and as in duty bound will ever pray.

J. R. McINTOSH.
Agent & Att'y for the Postal Telegraph-Cable Co.
BOYD & BROOKS,
Attorneys for Petitioner.

STATE OF NORTH CAROLINA, }
County of Guilford. }

This day personally appeared before me, J. R. McIntosh, who being duly sworn says, he is the agent and attorney of the petitioner, The Postal Telegraph-Cable Company in the foregoing cause, and that he personally, as such agent and attorney, has knowledge of the truthfulness of the facts therein stated, and that the same are true, and that such knowledge has come to him as the agent and attorney of said petitioner by observing the manner of the construction of the telegraph lines and the manner in which the same has been operated and managed, and from his personal intercourse with and information derived *for*, the general officers of said corporation.

That, *that* this affidavit is not made by an officer of petitioner for the reason that it is a foreign corporation, and that none of its officers reside in this State.

J. R. McINTOSH,
Agent & Att'y for the Postal Telegraph-Cable Co.

Sworn to and subscribed before me this June 11th, 1898.
ED. L. RAGAN, *C. S. C.*

7 *Superior Court Clerk's Certificate to Copy of Petition.*

NORTH CAROLINA, }
Guilford County. }

I, Ed. L. Ragan, clerk of the superior court, in and for said county, do hereby certify that the foregoing is a true and perfect copy of the complaint, or petition, now on file in this office in case of Postal Telegraph-Cable Company *vs.* The Southern Railway Co.

In testimony whereof, I have hereto set my hand and official seal at office in Greensboro, N. C., this June 17th, 1898.

[SEAL.] ED. L. RAGAN, *C. S. C.*

Special Appearance by Defendant's Attorneys.

POSTAL TELEGRAPH-CABLE COMPANY *vs.* SOUTHERN R'Y COMPANY. } Entry of Special Appearance.

Mr. Rob't Stiles and Mr. F. H. Busbee entered a special appearance for the defendant, for the purpose of entering a motion to remove the suit to the U. S. circuit court, and filing petition and bond.

JUNE 22, 1898.

And, thereupon, on said June 22, 1898, the defendant filed in the said superior —, the following petition and bond:

Petition for Removal to Circuit Court.

STATE OF NORTH CAROLINA,
County of Guilford.

Superior Court, June 21st, 1898.

THE POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff,
against
THE SOUTHERN RAILWAY COMPANY, Defendant.

Petition for order to remove this cause to the United States circuit court for the western district of North Carolina.

To the honorable the superior court of the county of Guilford, State of North Carolina:

Your petitioner, The Southern Railway Company, respectfully showeth that it is the defendant in the above-entitled suit or
8 civil action, which was begun against it in said superior court of Guilford county, North Carolina, by the issuance and service of a summons, and that a complaint or petition has been filed in said action, and that the defendant, your petitioner, files this petition at or before the time when it is obliged to answer or demur to the complaint or petition.

That the matter in controversy therein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the said suit — of civil nature, and is an action for the condemnation to the use of the plaintiff of certain rights of way of defendant in many counties of N. C., a large part of the said rights of way being situate in the western district of North Carolina.

Your petitioner further states that in the said above-mentioned civil action there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between your said petitioner, which was, at the commencement of this action, and still is, a citizen and resident of the State of Virginia, and the said Postal Telegraph-Cable Company who, your petitioner avers, was, at the commencement of this action, and still is, a citizen and resident of the State of New York, and is carrying on the business of a telegraph company in the State of North Carolina, and that both the said Postal Telegraph-Cable Company and your petitioner are actually interested in said controversy.

And your petitioner offers herewith a bond with good and sufficient surety in the sum of five hundred dollars for its entering in the circuit court of the United States for the western district of North Carolina, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded

by said circuit court, is said court shall hold that this action was wrongfully or improperly removed thereto, and for entering special bail, if such be required.

And your petitioner prays this court to proceed no further herein, except to make an order of removal, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the western district of North Carolina.

SOUTHERN RAILWAY COMPANY,
By ROB'T STILES AND
F. H. BUSBEE,
Its Attorney-.

9 STATE OF NORTH CAROLINA, }
County of Guilford. }

F. H. Busbee, being duly sworn, doth say that he is attorney of The Southern Railway Company, the petitioner in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof, and that the matters therein stated are true, except as to matters stated on information and belief, and as to these he believes it to be true.

F. H. BUSBEE.

Sworn — and subscribed before me this June 22, 1898.
ED. L. RAGAN, *C. S. C.*

Endorsed: Filed June 22, 1898. Ed. L. Ragan, C. S. C.

Bond for Removal to Circuit Court.

NORTH CAROLINA, }
Guilford County. }

Superior Court, June 22d, 1898.

THE POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff, }
against }
THE SOUTHERN RAILWAY COMPANY, Defendant. }

Bond for removal of this cause to the United States circuit court for the western district of North Carolina.

Know all men by these presents that the Southern Railway Company, as principal, and W. B. East, as surety, are held and firmly bound unto the Postal Telegraph-Cable Company, and all other persons whom it may concern, in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the said Southern Railway Company has petitioned the superior court of Guilford county, State of North Carolina, for the removal of certain

vil action therein pending, above mentioned, wherein The Postal elegraph-Cable Company is plaintiff and The Southern Railway ompany is defendant, to the circuit court of the United States in and for the western district of North Carolina.

Now, if the said Southern Railway Company, your petitioner, shall enter in the said circuit court of the United tates for the western district of North Carolina, on the first day of s next session, a copy of the record in said action, and shall well nd truly pay all costs that may be awarded by said circuit court f the United States, if said court shall hold that said action was rongfully or improperly removed thereto, and shall also then appear and enter special bail, if special bail be requisite therein, and hall enter appearance of said Southern Railway Company in said ourt, then this obligation shall be void; otherwise to remain in ll force and effect.

Witness our hands and seals this 22 day of June, 1898.

SOUTHERN RAILWAY COMPANY, [SEAL.]
By F. H. BUSBEE.
W. B. EAST. [SEAL.]

UILFORD COUNTY, *ss:*

W. B. East, being duly sworn, saith that he is a resident of Guilord county, North Carolina, and that he is worth double the sum pecified in the above bond above all his debts and liabilities and xclusive of property exempt by law from execution.

W. B. EAST.

Sworn to and subscribed before me this 22 day of June, 1898.

ED. L. RAGAN, *C. S. C.*

Endorsed: Filed June 22, 1898. Ed. L. Ragan, C. S. C.

Order Overruling Motion to Remove Cause to Circuit Court.

POSTAL TELEGRAPH-CABLE CO. }
vs.
THE SOUTHERN RAILWAY CO. }

The motion of the Southern Railway Company for removal of id cause to the circuit court of the United States for the western strict of the State of North Carolina, coming on to be heard by e court upon the papers filed, is hereby overruled.

This court holding that the amount in controversy is not shown by the pleadings in said cause to be as much as $2,000, and from the facts stated in the petition of the Postal Telegraph-Cable Company, the court is of the opinion that the amount damages to which the railroad is entitled from the telegraph mpany for the rights and privileges sought in said petition are ss than $2,000. The said railway company is given 20 days in

which to file its answer with the clerk of this court to the petition of said telegraph company.

This 22 June, 1898.

W. S. O'B. ROBINSON,
Judge Presiding.

To the order overruling the motion to remove defendant excepts.

Superior Court Clerk's Certificate.

NORTH CAROLINA, }
Guilford County. }

I, Ed. L. Ragan, clerk of the superior court in and for said county, do hereby certify that the foregoing is a true and perfect copy of the proceedings in the above-entitled cause, to wit: The Postal Telegraph-Cable Co. *vs.* Southern R'y Co., as appears on file in this office.

In testimony whereof I hereunto set my hand and official seal at office, in Greensboro, N. C., this June 23rd, 1898.

[SEAL.] ED. L. RAGAN, *C. S. C.*

Endorsed: Filed in this office June 25th, 1898. Sam'l L. Trogdon, clerk.

Affidavit of A. B. Kimball.

I, Ashbel B. Kimball, being first duly sworn, do make oath as follows, to wit:

That on Saturday, the 25th day of June, 1898, the Postal Telegraph-Cable Company, appeared by Maj. Stedman of the Greensboro, N. C. bar, at the request, as he stated, — J. R. McIntosh, Esq., counsel for said company, and moved Judge Robinson, then presiding over and holding the superior court of Guilford county, for permission to amend its petition heretofore filed in the clerk's office of said court on the 22nd day of June, 1898; said petition asking
12 the condemnation for the purposes of said telegraph-cable company, of the property of the Southern Railway Company, as set out in said petition, by making The North Carolina Railroad a party defendant to said petition; and that the said superior court of Guilford county overruled and denied said motions upon the ground that the counsel for The Southern Railway Company, the sole defendant to said original petition, filed on the 22nd day of June, 1898, had left Greensboro after the entry of the court's order upon said petition on the said 22nd day of June, 1898.

I do further make oath that the said North Carolina railroad is, and was, at the time of the commencement of the proceedings of the Postal Telegraph-Cable Company above referred to, a citizen of the State of North Carolina.

ASHBEL B. KIMBALL.

Subscribed and sworn to before me this July 8, 1898.

ED. L. RAGAN, *C. S. C.*

ndorsed: Filed in this office Jul- 18, 1898. Sam'l L. Trogdon, k.

Affidavit of R. R. King.

, Robert R. King, being first duly sworn, do make oath as fol- s:

'hat on or about the 24th day of June, 1898, the Postal Tele- ph-Cable Company, by J. R. McIntosh, Esq., its counsel, ap- ached me as local counsel for the Southern railway and stated t he had moved Judge Robinson, then presiding over and hold- the superior court of Guilford county, N. C., he being the same ge who heard the original petition in the case herein referred to. the 22nd of June, 1898, and moved the said judge for permission amend its petition heretofore filed in the clerk's office of said rt on the 22nd of June, 1898, asking the condemnation for its poses of the property of the Southern railway, as set out in its l petition, by making The North Carolina Railroad Company a ty defendant to said petition; and that the said McIntosh fur- r stated that the said superior court of Guilford county had de- ied and denied said motion, upon the ground that the counsel The Southern Railway, the sole defendant to the said original ition, filed on the 22nd day of June, 1898, had left Greensboro r the entry of the court's order on said petition on the said 22nd of June, and that said Southern railway was not represented before the court by counsel at the time the Postal Telegraph-Cable Company submitted its said motion to amend its peti- tion as above set out. That this affiant stated to Mr. Mc- osh that he was in no way connected with the case, and did not, l could not, in the absence of express authority, consent to any endment; and affiant further states that on the afternoon of the ie day he was in court and heard the said Postal Telegraph- ble Co., through its counsel, J. R. McIntosh, again renew the tion above referred to, when Judge Robinson again declined l denied said motion.

And I do further make oath that upon Saturday, the 25th day of ne, 1898, said Postal Telegraph-Cable Company, appearing by j. Stedman, of the Greensboro bar, at the request of Mr. McIntosh, ne stated, again moved said superior court of Guilford county llow it to amend its said petition as hereinabove set out, and t said renewed motion was overruled and denied by said court on the same grounds as hereinabove stated with regard to the e motions made on the preceding day. And I do further make h that said North Carolina Railway Company is, and was, at the e of the commencement of the proceedings of the Postal Tele- ph-Cable Company above referred to, a citizen of the State of rth Carolina.

ROBERT R. KING.

ubscribed and sworn to before me this July 8, 1898.

ED. L. RAGAN, *C. S. C.*

Endorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon, clerk.

Revenue stamp 10 cts. attached.

Affidavit of W. P. Cline.

I, W. P. Cline, being first duly sworn, do make oath as follows, to wit: That on Saturday, June 25th, 1898, Mr. Ed. L. Ragan, clerk of the superior court of Guilford county, N. C., stated to me that on Friday, the 24th day of June, 1898, the Postal Telegraph-Cable Company, by J. R. McIntosh, its counsel, appeared in the superior court of Guilford county, North Carolina, and twice moved said court for permission to amend its petition heretofore filed in the clerk's office of said court on the 22nd day of June, 1898, asking the condemnation for its purposes of the property of the Southern Railway Company as set out in its said petition, by making The
14 North Carolina Railroad Company a party defendant to said petition; and that the said superior court of Guilford county overruled and denied said motions, upon the ground that the counsel for The Southern Railway Company, the sole defendant to said original petition, filed on the 22nd day of June, 1898, had left Greensboro after the entry of the court's order upon said petition on the 22nd day of June, 1898, and that said Southern Railway Company was not represented before the court by counsel at the time the Postal Telegraph-Cable Company submitted its said motions to amend its petition, as above set out; and that upon Saturday, the 25th day of June, 1898, said Postal Telegraph-Cable Company, appearing by Maj. Stedman, of the Greensboro bar, in the absence of Mr. Brooks, of counsel for the said Postal Telegraph-Cable Company, who was sick and unable to appear in court, moved said superior court of Guilford county to allow it to amend its said petition, as hereinabove set out, and that said renewed motion was overruled and denied by said court upon the same grounds as hereinbefore stated with regard to the like motions made on the preceding day.

And I do further make oath that upon Friday, July 8th, 1898, the said Mr. Ed. L. Ragan confirmed the statement substantially as above set out, except as to the motion said to have been made by Maj. Stedman, and, as to this, he states the court declined to hear the motion, and upon my request for his affidavit as to the facts above set forth, expressed his willingness to make such affidavit; but, upon further consideration, declined to do so, for the reason that the proceedings above referred to were begun before him in office, and he does not feel entirely satisfied that such action on his part would be proper.

And I do further make oath that, before verifying this statement above set out, I consulted with the said Mr. Ed. L. Ragan, and obtained his assent to its correctness.

W. P. CLINE.

scribed and sworn to before me this July 8th, 1898.

ED. L. RAGAN, *C. S. C.*

dorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon,

venue stamp 10 cts. attached.

Affidavit of Z. V. Taylor.

Z. V. Taylor, of the firm of Bynum, Bynum and Taylor, attor-at-law, being duly sworn, do make oath as follows, to wit: on Friday, June 24th, 1898, I was present at the session of the ior court of Guilford county, N. C., and just as court adjourned, rd Col. McIntosh, counsel for the Postal Telegraph-Cable Co., oach his honor, Judge W. S. O'B. Robinson, for the making n motions in a case then pending, or which had been hereto- rgued before his honor; that Judge Robinson told him it was uty to have made the motion when counsel for the opposing es were present in the court, and could have been heard, and hat reason, stated he would not allow the motion or hear any ment concern- it. I was also present during the sitting of ourt on Saturday, June 25th, and heard Major Chas. M. Sted- lodge a motion in court, which, he said, was done at the request friends, Col. McIntosh and Mr. Brooks, the latter being con- to his room on account of sickness. I do not remember what notion was, but do remember that the court refused to allow it.

Z. V. TAYLOR.

scribed and sworn to before me, this July 8th, 1898.

ED. L. RAGAN, *C. S. C.*

dorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon,

venue stamp 10 cts. attached.

Affidavit of E. T. D. Myers.

RICHMOND, VA., *July 8th*, 1898.

n asked whether the right of way of the telegraph company the right of way owned by the Southern Railway Co. in North na, a length of 193 miles, is worth more than two thousand s ($2,000). In my opinion it is worth much more.

E. T. D. MYERS.

CF VIRGINIA, } *To wit:*
ity of Richmond, }

Personally appeared before me this day, E. T. D. Myers, whose name is signed to the above writing, bearing date July 8th, 1898, and made oath that the statements contained n are true to the best of his knowledge and belief.

en under my hand and seal this 8th day of July, 1898.

ALEX. W. WEDDELL,
Notary Public.

Endorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon, clerk.

Revenue stamp 10 cts. attached.

Affidavit of T. M. R. Talcott.

I am by profession a civil engineer, and have been connected with and operating railroads ever since 1854, in almost every department and every capacity, as general engineer, general manager, general superintendent, and I was for some time first vice-president of the Richmond & Danville, now the Southern Railway Company. I am not, however, now connected in any way with the said company.

I am thoroughly well acquainted with the right of way of said company, including its right of way in North Carolina, in the counties in which, as I am informed and have seen from a copy of its petition, the Postal Telegraph-Cable Company is seeking to condemn a right of way for its purposes, embracing the length of 193 miles or more.

I am asked to state whether in my opinion the right of way so proposed to be condemned by the Postal Telegraph-Cable Company is worth the sum of $2,000, exclusive of interest and costs. As a railroad expert, I have no hesitation in saying that said right of way is worth a great deal more than the sum mentioned; that is, that the sum which should be awarded to the Southern Railway Company as a compensation for the right of way so condemned ought, in my judgment, to be largely more than the sum mentioned, to wit: $2,000, exclusive of interest and costs.

This July 9th, 1898.

T. M. R. TALCOTT.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

This day personally appeared before me, a notary public for the city aforesaid, in the State of Virginia, T. M. R. Talcott, to
17 me personally known, whose name is signed to the foregoing writing, bearing date the 9th day of July, 1898, and acknowledged the same before me, in my city aforesaid, and I do further certify that the said T. M. R. Talcott affirmed that the statements therein contained are true, to the best of his knowledge, information and belief.

Given under my hand and notarial seal this ninth day of July, A. D. 1898.

WM. SINTON,
Notary Public.

Endorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon, clerk.

Revenue stamp, 10 cts., attached.

Affidavit of Frank S. Gannon.

Court of the United States, Western District of North Carolina.

TELEGRAPH-CABLE COMPANY *vs.* HERN RAILWAY COMPANY. } Affidavit of July 9th, 1898.

: S. Gannon, being duly sworn, doth say that he is third sident of The Southern Railway Company, the defendant amed. That he has had for some time official connection railroad company operating the lines of railroad from the e near Danville, Va., to Charlotte, along the Piedmont and th Carolina railroads, and from Raleigh to Winston, along th Carolina and Northwestern North Carolina railroads; has had many years' experience in the operation and man- of railroads, occupying different positions, and is able to an intelligent opinion as to the values of rights of way. e length of railroad along which the plaintiff, in the con- on proceeding above mentioned, desires to erect its poles, is vo hundred and forty-two miles, being about one hundred enty-three miles of the North Carolina railroad, about forty- es of the Piedmont railroad, and about twenty-eight miles Northwestern North Carolina railroad; that, in the opinion ffiant, the value of this right of way to the plaintiff, if con- to the use of the plaintiff, would certainly be largely more dollars per mile, and that the damage sustained by de- ndant by reason of the condemnation and use of its right f way by plaintiff, and erection and maintenance of poles nd wires along said right of way, thereby interfering with it's full control of its right of way, would be more than two l dollars. Affiant is therefore of the opinion that the in controversy in this proceeding is more than two thou- lars.

FRANK S. GANNON.

and subscribed before me this 9th day of July, 1898.

WM. M. NETHERLAND,
AL.] *Notary of Public, Dist. of Columbia.*

sed: Filed in this office July 18th, 1898. Sam'l L. Trog- k.

Affidavit of R. M. Sully.

RICHMOND, VA., *July* 9, 1898.

been connected with railroads about forty years; first as ngineer and then in various positions in the traffic depart- have been superintendent and general superintendent for In 1885 I was the general superintendent of the Peters-

burg Railroad Company. Upon the consolidation of the Petersburg railroad with the Atlantic Coast line, I became the superintendent of the Richmond and Petersburg and the Petersburg Railroad Companies, which position I have occupied ever since.

I am informed that application has been made to the superior court of Guilford county, North Carolina, by the Postal Telegraph-Cable Company for the condemnation of a right of way for its purposes along and upon the right of way of the Southern Railway Company, from a point on the State line between the States of North Carolina and Virginia, where said railroad right of way crosses said State line, thence south, through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarrus, and Mecklenburg to the town of Charlotte in said last-named county; and from the town of Greensboro, in said county of Guilford, to the city of Raleigh, in said State, passing through the counties of Guilford, Alamance, Orange, Durham, and Wake, the whole distance being about 195 miles.

I am further informed that the Southern Railway Company has removed said proceeding to the circuit court of the United
19 States at Greensboro, North Carolina, and that the question has arisen whether or not the matter in dispute, that is, the amount or value of the matter as above put in controversy between the Postal Telegraph-Cable Co. and the Southern Railway Co. exceeds the amount or value of $2,000, exclusive of interests and costs.

It is not difficult to answer this question, but it is difficult to realize that it ever has been seriously raised. I am fairly well acquainted with the right of way and track of the Southern Railway Company in the counties and between the points mentioned above, and have no hesitation in saying, as a railroad expert, that the sum justly due to the Southern Railway Company, as compensation for the proposed condemnation of its right of way, throughout the counties and between the points named, very greatly exceeds in value the sum of $2,000, exclusive of interests and costs, so greatly indeed, that I would find it difficult to express any definite opinion and judgment in this regard.

I am further informed that the said Postal Telegraph-Cable Company agrees, "in the event that said railway company shall express a desire for the location of said line at some other points on said right of way than as designated above, or in the event that said railway company shall at any time desire to change the location of its track or construct new tracks or side tracks where same do not now exist, petitioner hereby agrees to remove said poles to such other points on said right of way adjacent thereto, which shall be designated by said railway company, upon reasonable notice and at the expense of petitioner."

Such a provision, if it could be embodied in the order of a court condemning property—as to which I express no opinion—would, of course, tend to lessen the otherwise intolerable embarrassment, destruction and damage to a railroad company involving the enforced occupancy by the telegraph company of its right of way, but

not seriously modify the statement and opinion above
The fact is that the telegraph company which at present
with its lines part of the right of way of the railroads
ch I am connected, is bound by its agreement with the
uthorities to change the location of its poles and lines at
h, and yet that company, in addition to other valuable
tions given by it, is willing to pay, and does pay, for the
rilege of occupancy of the railroad right of way and an-
al per mile, which would indicate a value for the right of
ng the 193 miles of the Southern railway, sought to be
ed by the Postal Telegraph-Cable Company, far in excess
, exclusive of interest and costs.

R. M. SULLY.

ATE OF VIRGINIA, } *To wit:*
City of Richmond, }

Ellis Stern, a notary public for said city, in said State, do
at R. M. Sully, whose name is signed to the attached
bearing date July 9th, 1898, has this day made oath before
he statements contained therein are true, to the best of his
ge and belief.

under my hand and seal this 9th day of July, 1898.

CARY ELLIS STERN,
Notary Public.

ed: Filed in this office July 18, 1898. Sam'l L. Trogdon,

ue stamp, 10 cts., attached.

Affidavit of F. H. Busbee.

rcuit Court of the United States for the Western District
th Carolina, at Greensboro, Fourth Circuit. In Equity.

SOUTHERN RAILWAY COMPANY
vs.
POSTAL TELEGRAPH-CABLE COMPANY.

Busbee, being duly sworn, saith that he was and is of coun-
fendant in the condemnation proceedings instituted in the
court of Guilford county by the Postal Telegraph-Cable
against the Southern Railway Company. That some time
case was called before Judge Robinson, in a conversation
ffiant and Col. McIntosh, leading counsel for the telegraph
Col. McIntosh stated that he had no doubt that commis-
ould be appointed at once by the court, and in effect asked
consent, or not to object or not to interpose delays. Affi-
, in substance, that this would be rather rapid, and, in the
conversation, mentioned the fact that the Southern was
ffiant did not suggest that the N. C. R. R. Co. should be
arty, or presume to advise or make suggestions to opposing

counsel. Affiant's recollection is that Col. McIntosh stated that, in his opinion, it was not necessary to make the lessor a party.

21 In the argument before Judge Robinson, which occurred thereafter, counsel for plaintiff telegraph company stated that he desired to make an amendment by adding another county, which, by consent of the railroad company, was permitted. At no time during or before the argument was there any suggestion whatever that the N. C. R. R. Co. should be made a party, and the first time that any suggestion of this kind was made was in a telegram sent by Col. McIntosh and received by affiant after his return to Raleigh.

That when Judge Robinson indicated his decision counsel for the So. R'y Co. at once stated that the question would be taken to the Federal court.

F. H. BUSBEE.

Sworn and subscribed to before me this 13th day of July, A. D. 1898.

C. B. MOORE, *Clerk*,
Per A. S. PATTERSON, *Deputy*.

Endorsed: Filed in this office July 18, 1898. Sam'l L. Trogdon, clerk.

Revenue stamp 10 cts., attached.

Amended Petition.

STATE OF NORTH CAROLINA, *Guilford County.*

Supreme Court, before the Clerk.

POSTAL TELEGRAPH-CABLE CO. *vs.* THE SOUTHERN RAILWAY CO. } Petition.

Your petitioner, The Postal Telegraph-Cable Company, represents that it is a corporation, duly incorporated under the laws of the State of New York, with authority to construct, maintain and operate telegraph lines throughout the State of New York, and other States of the United States of America, including the State of North Carolina. And by virtue of chapter 49, of the Code of North Carolina of 1883, and the acts of the General Assembly of said State amendatory thereof, desires to construct, maintain and operate a line of telegraph along and upon the right of way of the Southern Railway Company, from a point on the State line between the States of North Carolina and Virginia, where said railway right of

22 way crosses said State line, thence south through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarrus and Mecklenburg, to the town of Charlotte, in said last-named county, and from the town of Greensboro, in the said county of Guilford, to the city of Raleigh, in said State, passing through

the counties of Guilford, Alamance, Orange, Durham and Wake, and from the town of Greensboro to the town of Winston, in the county of Forsyth, the whole distance being about 193 miles.

The telegraph line, when so constructed, will connect with the telegraph lines already constructed, owned and operated by it, making complete telegraphic connections throughout the United States of America, Canada and Mexico, with cable connections to Europe. (As amended by order of the court.) And the said Postal Telegraph-Cable Co. has, as required by section 5268 of the Revised Statutes of the United States of America, filed its written acceptance with Postmaster General of the United States, of all the restrictions and obligations by the acts of Congress, approved July 24th, 1866, entitled, "An act to aid in the construction of telegraph lines, and to secure to the Government use of the same for military purposes."

Petitioner represents that it has failed, on application therefor, to secure by contract or agreement the right to erect its telegraph lines upon the right of way aforesaid, and for the purpose aforesaid, with the said defendant railway company, and that it has given security for the costs of these proceedings.

That said defendant railway company extends to and runs within the town of Greensboro, in said county of Guilford, and has an agent located therein, upon whom service may be had in these proceedings, as provided for in section No. 2011 in the said State Code.

Your petitioner desires to construct its telegraph line upon the west side of the line of track of said railroad from the town of Charlotte, aforesaid, to the said State line, and on the south side of said railroad track from the said town of Greensboro, in the said county of Guilford, to the city of Raleigh, in the county of Wake, and to erect its poles along the outer edge of said right of way, about four feet from the said outer edge of right of way, unless it be that at some points of said right of way, at that distance from said outer edge, there be found obstructions that will prevent the erection of said poles at such points, then, in such event, petitioner proposes to erect said poles as near said outer edge of said right of way, as can be done without interference with any other line of telegraph, or other construction on said right of way.

23 Petitioner represents that the said Southern railway is a single line, with its railroad bed constructed at or near the centre of its right of way, and that its track is about 4 feet 8½ in. guage, together with switches, turnouts, stations, side tracks, turntables, water tanks, &c., such as is necessary to carry on and operate a single line of railway. That the right of way of said railway is about one hundred feet wide, and extends about fifty feet from a line along the centre between the rails of said main track.

That the line of telegraph to be constructed by petitioner will be of best material, and upon the most improved plan, with poles about twenty-six feet in length, and one foot in diameter at the base, and will be firmly planted in the ground at a depth of not less than five feet, and upon such poles will be attached such suitable cross-arms about six feet in length, fastened near the top of said poles with insulators thereon, upon which will be strung, at or

near the upper end, wires of suitable material, and of suitable number, so as to enable petitioner to promptly transmit all telegraphic messages entrusted to it. There will be about 35 poles to the mile.

In places where its lines cross the track, or where it is necessary to do so to prevent interference with any work, use or structure, or the operation of any trains of said railway company, petitioner's poles will be so high above the ground as to permit its wires to be suspended so far above any structure of defendant company as to prevent any interference therewith. The said cross-arms will extend the same distance on each side of said poles.

The said cross-arms will extend the same distance on each side of said poles. Said poles will be so erected, and said telegraphic line so constructed and maintained as not to obstruct or hinder the usual travel and business of said railroad company, nor in any way interfere with the operation of said company, nor with any telegraph line now constructed on said right of way.

In the event that said railway company shall express a desire for the location of said line at some other points on said right of way than as designated above, or in the event that said railway company shall at any time desire to change the location of its track, or construct new tracks, or side tracks, where same do not now exists, petitioner hereby agrees to remove said poles to such other points on said right of way adjacent thereto, which shall be designated by said railroad company, upon reasonable notice, and at the expense of petitioner.

Petitioner will not construct its line, or in any way at-
24 tach the same, to any of the trestle-work or bridges of said railroad company, or upon any of its embankments.

Said telegraph line, when constructed, will in no way damage the property of said railroad company, nor impair nor diminish the value of said right of way for railroad purposes, but that the same will be beneficial to said railroad company and its patrons.

The said defendant railroad company is duly incorporated, doing business by virtue of its charter, with a right of way of 100 feet in width, obtained by enactments of the General Assembly of this State for railroad purposes alone.

Petitioner does not desire by these proceedings to secure the fee to any part of the right of way of said defendant railroad company, but only to obtain the right to construct, maintain and operate over, along and upon said right of way of the said railroad company a telegraph line as aforesaid.

Your petitioner prays for the rights and privileges hereinbefore enumerated for the *bona fide* purposes of obtaining said easement and right of way, in order to erect, maintain and operate the said telegraph line for the benefit and accommodation of the general public, and prays that a copy of this petition, with notice of time and place, be served upon the defendant, when the same will be presented to the superior court, at least ten days prior to the presentation of same to this court, and that such proceedings may be had

and orders made and judgments entered as are in such cases provided for by statu-e, and as in dutay bound will ever pray.

(Signed) J. R. McINTOSH,
Agent & Att'y for the Postal Telegraph-Cable Co.
BOYD & BROOKS,
Attorneys for Petitioner.

STATE OF NORTH CAROLINA, }
County of Guilford. }

This day personally appeared before me, J. R. McIntosh, who, being duly sworn, says he is the agent and attorney of the petitioner, The Postal Telegraph-Cable Company in the foregoing cause, and that he personally, as such agent and attorney, has knowledge of the truthfulness of the facts therein stated, and that the same are true, and that such knowledge has come to him as the agent and attorney of said petitioner by observing the manner of the construction of the telegraph lines and the manner in which the same has been operated and managed, and from his personal intercourse with, and information derived from, the general officers of said corporation.

That *that* this affidavit is not made by an officer of petitioner for the reason that it is a foreign corporation, and that none of its officers reside in this State.

J. R. McINTOSH,
Agent & Att'y for the Postal Telegraph-Cable Co.

Sworn to and subscribed before me this June 11th, 1898.
ED. L. RAGAN, *Clerk.*

Endorsed: Filed in this office July 22nd, 1898. Sam'l L. Trogdon, clerk.

Opinion Continuing Restraining Order and Refusing to Remand.

THE UNITED STATES OF AMERICA, }
Western District of North Carolina. }

In the Circuit Court, Fourth Circuit.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY. } At Law.

THE SOUTHERN RAILWAY COMPANY
vs.
THE POSTAL TELEGRAPH-CABLE COMPANY. } In Equity.

These two cases came up together under these circumstances: The Postal Telegraph-Cable Company entered proceedings in the superior court of Guilford county, in the State of North Carolina, seeking to condemn the right to erect its poles and stretch its wires over and along the right of way of the Southern railway in North Carolina. The petition, among other things, alleged the intention

of the Postal Telegraph-Cable Company to erect its poles and stretch its wires very near the outer limits of the right of way of the railway company, so as in nowise to interfere with its use of its track, and if in any case it should hereafter appear that any of the said poles were obstructing such use that the telegraph company would remove them at its own expense on reasonable notice.

26 Upon the institution of these proceedings the Southern Railway Company filed its petition for removal of the case into this court, relying upon two distinctly stated facts, the diversity of citizenship between it and the telegraph company, and that the matter in dispute exceeded two thousand dollars besides interest and costs. The petition was accompanied by a bond with surety. Application having been made to the State court immediately upon the filing the petition and bond, an order of removal was refused upon the ground solely that the matter in dispute was not of a value exceeding two thousand dollars. The next day after this refusal the Southern Railway filed a transcript of the record in this court. On the same day the Postal Telegraph-Cable Company moved before the State court for leave to amend its proceedings for the purpose of making new parties. This motion was refused because made in the absence and without notice to the defendant's attorney. Because of this, and the fear of other motions, the Southern Railway Company filed its bill setting forth the facts stated above, and praying that the Postal Telegraph-Cable Company be enjoined from seeking to proceed any further in the State court, inasmuch as the cause had been removed into this court. This is the second cause mentioned in the title above set forth. It comes up on the return to the rule issued on filing the bill requiring cause to be shown why an injunction should not be issued as prayed for. The return, after disclaiming all knowledge that the cause had been removed into this court, and disavowing all want of respect thereof, rests upon the position that this court cannot entertain the case as the value of the matter in dispute is less than two thousand dollars.

As precisely the same question is made in the removal case, and as the two cases are closely connected with each other, it was determined to hear argument, with the understanding that the conclusion reached would dispose of both cases.

The controlling question in this matter, then, is, Is the proceeding in the superior court of Guilford county a proper case for removal into this court?

It is not questioned that that proceeding is a suit. Nor can there be any doubt on this point. Kohl *vs.* The United States, 91 U. S., 367; Searl *vs.* School District, 124 U. S, 199; Martin *vs.* B. & O. R. Co., 151 U. S., 673.

It is a suit between citizens of different States, the Postal Telegraph-Cable Company being a corporation of the State of New York, and the Southern Railway Company being a corporation of the State of Virginia.

27 The petition for removal with proper bond was filed before the time for answering had expired. This petition averred the two jurisdictional facts: 1st, the diversity of citizenship. 2nd,

t the matter in controversy exceeded the value of two thousand
lars, exclusive of interests and costs. Upon the truth of these
ts, of both of them, depends the right of removal. Powers *vs.*
t O. R'y, 169 U. S., 99. Issue was joined upon one of these facts,
jurisdictional amount, and the superior court, inadvertently it
ure, passed upon that issue. It could be decided nowhere but
this court. Carson *vs.* Hyatt, 118 U. S., 279; Carson *vs.* Dun-
n, 121 U. S., 421; Burlington, etc., R'y *vs.* Dunn, 122 U. S., 513;
nsas City R. R. *vs.* Daughters, 138 U. S., 298.

This being the case, and the petition on its face stating the two
ential facts for removal, upon the filing of it, the case was *ipso*
to removed and the State court could proceed no farther. Upon
e filing of the petition and bond, that is, just so soon as they were
d. Gordon *vs.* Longest, 16 Peters, 97; Insurance Co. *vs.* Dunn,
Wall., 214; Kern *vs.* Huidekoper, 103 U. S., 485; R. R. Co. *vs.*
untze, 140 U. S., 5; Act of Congress 3rd March, 1875, 18 Statutes
Large, 470.

It is very clear, therefore, that the State court could have taken
other action in this cause from the date of the filing of the peti-
n and bond, and that the efforts of the plaintiff in the State court
procure orders from that court were *coram non judice* and very
perly refused.

The grave question made here is upon remanding this cause to
State court. It is contended that this court has no jurisdiction
ause of the amount of the matter in controversy—that being less
n two thousand dollars.

t has been contended with great ability and eloquence that in
present case the Postal Telegraph-Cable Company seeks to erect
poles on the right of way of the railway company, which has
eady been dedicated to a public use. That it is confined to the
blic use. That, therefore, in estimating the compensation to be
d the railway company the same rule cannot be followed which
ains in the condemnation of the property of a private person.
t such private person holds his property and can put it to any
, and compensation for taking it must be measured accordingly.
e railway company holds its property for a public use only, and
compensation must be measured only by the interference with
performance of its public duty, growing out of the public use.
t the petition declares an intent in no way to interfere with this
public use, and so the compensation to the railway company
for putting up the poles and stretching the wires must be
nominal. Strong as this line of argument is, and however
vincing under other circumstances, it does not apply to the ques-
now at issue. That question is, must this case be remanded.
answer to this question depends upon the matter in contro-
y. What is the matter in controversy? The compensation to
llowed to the railway company for the erection of the poles
stretching of the wires by the telegraph company. The latter
ge that this compensation should be nominal. The former
ge that it should greatly exceed two thousand dollars. The
stion is, does it exceed two thousand dollars? On this question

the petition of the plaintiff in the State court and that of the defendant for removal differ, and on it the issue is joined. "By this phrase," says the Supreme Court, in Smith *vs.* Adams, 130 U. S., 168, *by this phrase*, "matter in dispute," as used in the statutes conferring jurisdiction on this court, is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue is one of fact, testimony is taken and its pecuniary value may be determined not only by the money judgment prayed, but in some cases by the increased or diminished value of the property directly affected by the relief prayed as by the pecuniary result to one of the parties immediately from the judgment. See also New England Mortgage Co. *vs.* Gay, 145 U. S., 127; Clay Center *vs.* Farmers, *ibid.*, 224.

In estimating the amount of the matter in controversy, the court is governed by the claim made, provided that there is no reason to believe that the claim has no *bona fide* existence and is only made to secure jurisdiction. Barry *vs.* Edmunds, 116 U. S., 550. This, then, is the mode of ascertaining the amount of the matter in controversy, and it being claimed on the one side that it greatly exceeds two thousand dollars, and wholly denied on the other, the determination of this issue gives this court jurisdiction. The issue must be tried in accordance with the laws of North Carolina in such case made and provided, and on the trial of the issue will come up the points so ably presented by counsel at bar.

Let an order be entered in the equity cause, continuing the restraining order until the further order of this court.

Let an order be entered refusing to remand the cause removed.

CHARLES H. SIMONTON,
Circuit Judge.

July 20, 1898.

29 Endorsed: Filed in this office, June 22, 1898. Sam'l L. Trogdon, clerk.

Order Overruling Demurrer.

In the Circuit Court of the United States for the Western District of North Carolina.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

This cause came before me, at Asheville, to be heard on the petition removed into this court and demurrer thereon, it is ordered, adjudged and decreed, that the demurrer be overruled.

CHARLES H. SIMONTON,
Circuit Judge.

31st August, 1898.

Endorsed: Filed in this office Octo. 8th, 1898. Sam'l L. Trogdon, clerk.

Order Refusing to Remand.

ıe Circuit Court of the United States for the Western District of North Carolina.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

ıis cause came before me upon a motion to remand to the State t, hearing the same, and after argument of counsel thereon, is ordered, that the motion to remand be refused.

CHARLES H. SIMONTON,
Circuit Judge.

ıdorsed: Filed in this office Octo. 8th, 1898. Sam'l L. Trogdon, .

Order Continuing Hearing to August 31st, 1898.

ıe Postal Telegraph-Cable Company having this day presented ition to this court filed herewith, and counsel for the Southern ay being present, ordered that the hearing as to petition be inued to 31st August current, and that on or before that day Southern Railway Company do take such action as to petition fore removed to this court as is provided in the code of North lina respecting the condemnation of lands for purposes similar ose in the said petition.

CHARLES H. SIMONTON,
Circuit Judge.

Aug., 1898.

f't- counsel except.

ıdorsed: Filed in this office Sept. 14, 1898. Sam'l L. Trogdon, .

Defendant's Bill of Exceptions No. 1.

AL TELEGRAPH-CABLE COMPANY
vs.
OUTHERN RAILWAY COMPANY.

Defendant's Bill of Exceptions No. 1.

is cause having been removed from the superior court of Guil- county, North Carolina, to this court, and, at sundry dates, ings and orders having been filed and entered therein as ap- in the record of which this paper is made a part:

it remembered that, on the 18th day of August, 1898, the court an order allowing the plaintiff to file a further petition herein, ed a hearing on said petition for August 31st, 1898, and re- d the defendant, The Southern Railway Company, to take ı both as to said petition and as to the original petition filed

by the plaintiff in this cause, which order is in the words and figures following, to wit: (Here insert order of August 18th, 1898. See order on page 30 of this record), to which order the defendant, The Southern Railway Company, then and there, by counsel excepted. And on the 31st day of August, 1898, (no other proceedings having in the meantime intervened), said Southern Railway Company, by its attorneys, appeared, and, expressly reserving the right further to except to the two petitions of the plaintiff filed in this cause, and to each of them, by leave of court moved to dismiss the said petitions, and each of them, submitting a written paper containing
31 the grounds upon which said motion was based, which paper is in the words and figures following, to wit: (Here insert paper containing 16 grounds of motion to dismiss. See this paper on page 96 of this record.) And the court, having heard argument upon the said motion, took time to consider thereof, and on the 14th day of September, 1898, rendered its opinion in writing, together with an order also in writing overruling the motion to dismiss; but upon the face of said order referring to said motion to dismiss as a demurrer, and which said order was erroneously dated August 31st, 1898, said order being intended, however, as will appear from its terms, only to overrule the defendant's aforesaid motion to dismiss the plaintiff's petition and proceeding, which opinion and order are in the words and figures following, to wit: (Here insert opinion and order. See opinion on page 31, and order on page 29 of this record), to which opinion, action, ruling and order of the court overruling its said motion to dismiss plaintiff's said petitions and proceedings, the defendant, The Southern Railway, by counsel, excepted, and prayed that this, its first bill of exceptions, be signed, sealed, enrolled and made a part of the record, which is accordingly done.

CHARLES H. SIMONTON, [SEAL.]
Circuit Judge.

4 November, 1898.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

Opinion Dismissing Defendant's Second Petition and Authorizing the Appointment of Comm'rs under Section 1945 of N. C. Code.

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

The Postal Telegraph-Cable Company filed its petition in the superior court of Guilford county, North Carolina, seeking to condemn a right of way over the lands of the Southern Railway Company. The peti-oner sought a right of way for the erection of its

and the stretching of its wires a few feet within the outside of the right of way of the railway company, so as in no way to obstruct or interfere with the use of its track by the railway company. The right of way sought extended through many counties of the State, the whole distance being largely two hundred miles. The only other party to the petition was Southern Railway. Upon the filing of the petition, proceedings were taken to remove the controversy into this court, and a motion to remand having been refused, the case is now here. After cause was retained in this court, the Postal Telegraph-Cable Company filed another application, in effect, praying that pending the proceedings it have leave to go upon the lands of the railway company and construct its line, upon such terms of bond and security as the court should deem proper, at the same time averring that in no event could any other damages be assessed against it except such as were substantially nominal.

The respondent, The Southern Railway Company, now comes and moves that both petitions be dismissed. The motion is, in effect, a demurrer and to sustain it are set out in full sixteen grounds of demurrer. These embrace three general propositions:

1. That there is now no law in the State of North Carolina providing for the condemnation of lands or right of way for the use of telegraph companies.

2. That if there be such law in North Carolina, the petition of the telegraph company in this case has not followed it in essential particulars.

3. That the petition is vague and uncertain in not stating how or by what tenure the lands owned by the railway company are held, whether only as an easement or in fee.

The respondent contends that there is no law in the State of North Carolina providing for the condemnation of land or right of way for the use of telegraph companies.

There is no doubt that any telegraph company, incorporated by any State of the Union, has the right to construct and maintain lines of telegraph along any railroad or other public highway in North Carolina, provided that they be so constructed as not to obstruct or hinder the usual travel thereon. Code of North Carolina, section 2007.

Such right may be obtained from the railway company, owner of the land, franchise or easement therein, by contract. (Code of North Carolina, 1883, section 2008.)

The same code, sections 2009, 2010, provided that failing to make such a contract, the telegraph company could, exercising the right of eminent domain, obtain the right of way desired and the right to erect its poles and establish offices upon making just compensation therefor.

This same right to construct its lines along the right of way of post roads of the United States is given under the act of Congress of 1866, to all telegraph companies accepting the provisions of that act. (Revised Statutes of the United States, sections 5263–5269.) The petitioner is one of the companies which has complied

with all the requirements of this act, and has secured its privileges. But, notwithstanding this, before the privilege can be exercised upon lands, the property of private persons or corporations, the consent of such persons must be obtained, or such proceedings must be had as will insure them just compensation. No act of Congress can give the right of taking private property for public purposes without first paying just compensation. (Constitution of the United States, V amendment.) And although section 8, of article 1, gives Congress power to establish post-roads and to make all laws which may be necessary to carry this power into effect, "like all other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by this instrument, among them that of the fifth amendment." (Monon Navigation Co. *vs.* The United States, 148 U. S., 325.)

The mode or method of exercising this right of eminent domain is fixed by the laws of the several States. Such mode or method is exclusive in its character in ascertaining the amount of the just compensation to be allowed. See Roberts *vs.* Northern Pacific R. R. Co, 158 U. S., 1; Sweet *vs.* Rechel, 159 U. S., 380. The Federal courts do not interfere with it, provided due process of law be furnished. Chicago *vs.* Chicago, 166 U. S.

This being the case, we must look to the statute law of North Carolina alone for the mode of proceeding in the condemnation of lands or right of way—for the conduct of the procedure and for the steps by which the just compensation is reached. It is true that the purposes of the petitioner are greatly for the public benefit—that it is an important factor in interstate commerce, one of the agencies, and a most valuable agent, in interstate commerce, and that it is of most essential service to the citizen in time of peace, and to the Government in time of war. But the underlying proposition in our civilization, and in Anglo-Saxon liberty, is the protection of the citizen in the safety of his person and in the undisturbed enjoyment of his property. And when he is called upon to surrender that property, against his will, for a public purpose, he is entitled to all the
34 safeguards which the law has thrown around the exercise of the tremendous, though wholesome, right of eminent domain.

What, then, is the law of North Carolina on this subject as provided for telegraph companies?

Section 2010 provides that whenever no agreement, after application, can be obtained by the telegraph company for securing the right of way, it may, first giving security for costs, file its petition before the superior court of the county in which the lands are situate, or through which the easement, franchises, or privilege extends, setting forth and describing the lands, privileges or easement over which the right of way is claimed, and the owners thereof. And if the right of way is sought only over an easement or right of way, the party owning such easement need be the only defendant.

Section 2011 provides for the service of a copy of this petition with the proper notice to be served on the defendant.

These two sections bring the parties into court. The next section provides the steps to be taken after the parties are in court, and

important constitutional provision shall be observed—the
ment of the just compensation, without which the right
e exercised.

1 2012 declares: "The proceedings for the condemnation
or any easement or interest therein, for the use of tele-
mpanies; the appraisal of the lands or the interest therein;
of the commissioners of appraisal; the right of either party
ceptions; the report of commissioners; the mode and man-
peal; the power and authority of the court or judge; the
gment and the manner of its entry and enforcement, and the
f the company pending the appeal;" these ten distinct
steps in the proceedings, all leading to the final result and
d with that only, "shall be as prescribed in this chapter for
ing lands to the use of railroads."

hapter in the code here spoken of is chapter 49. The pro-
f this chapter with respect to the condemnation of lands
se of railroads are found in sections 1945 *et seq.*. Inasmuch
n 2010 sets forth all the necessary statements for the peti-
he telegraph company and section 2011 provides for its
nly so much of the railroad law as directs proceedings after
ion is before the court is made applicable to telegraph com-

, therefore, the petition is presented to the court, and the
nswers of defendants have been heard, with the proofs on
ch side, if the cause shown against the petition be insuffi-
ent the court shall grant an order naming three disin-
freeholders to act as commissioners of appraisal, and shall
ay for the first meeting of these commissioners.

1 1946 prescribes the duties and powers of the commission-
ue subpœnas, administer oaths, examine witnesses, view the
, adjourn and appraise the compensation, "and in deter-
he amount of such compensation they shall not make any
e or deduction on account of any real or supposed benefits
e parties in interest may derive from the construction of
posed railroad." The commissioners make their report
al, either party may file exceptions before the clerk and
eal. If appeal is taken, the company may, notwithstand-
r, take possession and hold the land by paying into court
nt of the assessment. Then provision is made for the
final judgment, for the power to enforce the judgment,
is taken to limit the title to the company only during its
e existence. These are all the provisions made for the con-
n of lands or of any easement, and of the duty of com-
rs, the right of exception, the report of commissioners, the
appeal, the authority of the court or judge, the final
t and its mode of enforcement, and the right of the company
appeal. Manifestly, it is all that is referred to in section
This disposes of two positions taken in argument. Section
horizes the court to make all orders necessary to carry out
t of the chapter where the mode and manner of conduct-
proceedings to the appraisal and proceedings consequent

thereon are not expressly provided. It is seen that these are minutely provided for. And this section has no application here.

It was also insisted that section 1952 provides for maps of the route to be made and filed in the office of the clerk of the court of the county through which the road may run. This provision applies to steps antecedent to the filing of the petition for condemnation, indicating the proposed route and allowing objections to be made so that it may be altered if necessary. It is not that part of the railroad law prescribed for telegraph companies, for it makes its own provision as to the filing the petition and the contents of the petition, and only adopts that part of the railroad law which prescribes the steps to be taken after the petition is in court. For the same reason, the section 1944 cannot be made to apply to telegraph companies. This section prescribes the formalities to be observed in filing a petition by a railroad company, and what the
36 contents of such petition must be. Among others, it requires the company to state that the company has surveyed the line or route of its proposed road and make a map thereof, and has filed it in the clerk's office, &c. But section 2010, which provides for the filing of a petition by a telegraph company and for its contents, makes no such or similar provision, and only calls in the aid of the sections relating to railroads for proceedings subsequent to the filing of the petition.

Such are the provisions of chapter 49 of the Code of North Carolina relating to the condemnation of a right of way for a telegraph company—when it becomes necessary to exercise the right of eminent domain.

The Code, section 2012 says that these proceedings on the part of the telegraph companies, and all subsequent steps therein, "shall be as prescribed in this chapter for condemning lands to the use of railroad companies." Chapter 49. The words are without qualification "as prescribed in this chapter." Therefore, they are to be found in the chapter alone. This was the manifest purpose of the act. Had the legislature intended that telegraph companies should always be bound by provisions of the law in this behalf as to railroad companies then or thereafter existing, it would have said so, either by adding the words, "or any amendment thereof hereafter adopted," or language equivalent thereto. The general rule unquestionably is, that when a statute refers to and adopts an existing law, its purport is confined to the law as it then exists, and does not embrace or include any subsequent modification of it. (Kendall *vs.* The United States, 12 Pet., 524; Shrew *vs.* Jones, 2 McLean, 78; United States *vs.* Knight, 3 Sumner, 368.) Standing upon this principal of law, the respondent says that since the passage of the Code, the legislature of North Carolina has amended the provisions in that instrument relating to the condemnation of land for railroad purposes in several important and vital particulars, and to that extent repealing provisions in the Code. That as to these provisions so repealed, they no longer exist, are as if they never existed. (Requin *vs.* The Inhabitants of Denton, 14 Eng. L. & Eng., 127; Curran *vs.* Owens, 15 W. Va., 224; Musgrove *vs.* V. &

., 50 Miss., 681; Insurance Co. *vs.* Ritchis, 5 Wall., 544; B. Co. *vs.* Grant, 8 Otto, 398.) Were the rule otherwise, the ld insert in the statute essential words which the legis- e to omit. (United States *vs.* Goldenburg, 168 U. S., 103.) dant contends therefore, that these amendments have d the provisions of the Code in this behalf, and they no ger have the meaning they had. That thus, there ex- no practicable method for securing the right of way for graph companies—and in effect no law is free of force thereto.

ngs up the vital question in this case, and necessitated an on into the effect and purpose of these amendments.

e passage of the Code, the legislature of North Carolina nded this chapter in the following particulars: §§ 1944,

1944 has been amended by striking out all requiring the the railroad company to state that the line or route of ed road has been surveyed and a map made, the road he location certified and filed with the clerk. Act of 93.

been seen, section 2010, addressed exclusively to tele- panies, states minutely the facts to be set forth in the y telegraph companies—and makes no requirement of a reference is made to any provisions of the Code as to rail- anies until sec. 2012 is reached, and that section relates proceedings and steps to be taken after the petition has and served and has become of record. This amend- e act of 1893, therefore, effects telegraph companies in no

same act, section 1952, is repealed. This section required o should be filed with the clerk, showing route and loca- e proposed road, before constructing it.

of this section another was passed requiring the railroad at the time of serving the summons, also to serve such a r the reasons stated above this amendment cannot affect companies. It relates to regulations required before the court.

islature in 1891 amended section 1946. This section is se expressly made applicable to telegraph companies in tant provision as to the duties of the commissioners in de- the amount of just compensation. As has been stated n used these words:

determining the amount of such compensation they shall any allowance or deduction on account of any real or sup- efits, which the parties in interest may derive from the on of the proposed railroad." Were this applied to a case resent, the commissioners, in determining the amount of ion to be awarded the railway company for the use of its ay, could make no allowance or deduction for any sup- ed or real benefit which the railway company might ive from the erection of the proposed telegraph line.

The act of 1891 struck this provision out entirely, adding,

however, this proviso: "Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to the land, then the said railroad company shall pay the costs of the proceeding, and shall not have judgment for the excess of benefits over the damages."

Applying these words to a case like the present, it would read: In case the benefits to the railroad company caused by the erection of the telegraph line be ascertained to exceed the damages to the said railroad company, then the telegraph company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damages.

Does this amendment render nugatory the provisions of the Code as to telegraph companies, and in effect wipe them from the statute book? That construction of statutes, indeed of all written documents, should be *ut res valeat non pereat*. And if any construction can be made to reach this result it must be adopted. Especially so in this case. The legislature, after experience of the statute passed in 1874–'75, re-enacted its provisions in 1883, and perpetuated an elaborate and careful method of securing to the people of the State and to the country at large the valuable services of telegraph companies. To strike these from the statute books would require overwhelming and unanswerable arguments. Under the circumstances it must be inquired How can just compensation be measured when lands or right of way are required for the use of telegraph companies? It may be done either by construing this provision of the Code in section 2012, as adopting in *ipsis simis verbis* the language of section 1946, and reading section 2012 as if the words were again repeated. In this case it could be said that mere implication could not repeal it, and so the damages could be assessed thereunder. Or it may be held that the commissioners could assess the damages as if the qualifying words were out, that is to say, following the instructions of the section immediately preceding the words afterward stricken out, "ascertain and determine the compensation which ought justly to be made by the telegraph company to the railroad company." And if necessary the court in this respect could direct and instruct them as to a just method. In the present case, looking at it as a practical matter, no difficulty could arise. The railroad company deny altogether that any benefit or advantage can
39 arise to it in the erection of the telegraph lines, and on the contrary aver that it is detrimental to it in the last degree. The commissioners would have before them no question of benefits, but one altogether as to damages.

It does not appear to the court that this amendment destroys the provisions of the code as to the condemnation of lands or rights of way for the use of the telegraph companies.

2. Has the telegraph company in this case followed the requirements of the code in these essential particulars?

The petition follows closely, almost literally, the language of section 2010, prescribing what facts should be stated.

3. Is the petition vague and indefinite in any respect?

It asks a right of way over the right of way of the railway

company—a well-defined and well-known subject—under whatsoever tenure it may be held, above all thoroughly known to the railway company. It distinctly specifies what part of the right of way is desired—so many feet from the outer edge of the right of way, or anywhere in which it would not obstruct or impede the use of its track. All subject to the provisions of section 2007, that the line be so constructed, and after construction be so maintained as not to obstruct or hinder the usual travel on the railway. This is a condition inherent in the use.

The cause has been heard, as it were, on general demurrer, at the least on demurrer going to the merits of the case. No facts are in dispute, and the question of law controls. No answer over is necessary.

The defendant, however, asks that pending these proceedings it be allowed to enter upon the erection of its poles and the construction of its lines.

The mode of exercising the right of eminent domain, a right claimed here under the laws of the State, is prescribed and fixed by the laws of the State. This court is bound by and must act within its provisions. These laws made no provision for the entry on the lands sought to be condemned until the damages are assessed and paid into court. It must be observed that we are dealing with a case in which the petitioner seeks the protection of the law and asks that he get rights in the mode and under the provisions of that law. He has not entered. He is not in possession. He seeks the right to enter and to take possession. Under these proceedings he cannot get these rights, except in the language of the act, section 1946. Defendant's second petition is dismissed.

Commissioners will be appointed under section 1945, who will proceed as in the code directed, making such compensation as shall be just.

CHARLES H. SIMONTON,
Circuit Judge.

9 Sept., 1898.

Endorsed: Filed in this office Sept. 14th, 1898. Sam'l L. Trogdon, clerk.

Petition for an Order Allowing Plaintiff to Give Bond and to Proceed to Construct Telegraph Line.

U. S. OF AMERICA, }
Western District of N. C. }

In the Circuit Court.

THE POSTAL TELEGRAPH-CABLE CO. }
vs.
THE SOUTHERN RAILWAY CO. }

To the Honorable Chas. H. Simonton, judge of the fourth U. S. circuit court district:

1. Your petitioner, The Postal Telegraph-Cable Co., humbly represents that it instituted condemnation proceedings in the superior court of Guilford county, State of N. C., against the defendant, Southern Railway Co., to condemn so much of the right of way of said railway Co. as may be necessary to construct, maintain and operate a line of telegraph thereon from the State line between the States of Virginia and North Carolina near Danville, Va., where said railway crosses said State line, to the city of Charlotte, in the said State of N. C., and from the city of Greensboro, in said State, to the city of Raleigh therein and from the said city of Greensboro to the city of Winston, in said State, on said right of way of said defendant railway Co. Said petitioner stipulated in said petition to construct said telegraph line near the outer edge of said right of way, or such other points thereon as may be agreed upon between it and said railway Co., and, petitioner stipulating, that in the event such said railway Co. should at any time, for any purposes, need the ground, or land, where the telegraph poles of petitioner may be erected, said telegraph Co. would remove them at its own expense, and that such telegraph lines should be so constructed as not
41 to interfere with said railway Co. in the operation of its trains, or the conduct of its business for which it holds said right of way.

2. That said cause was, upon the application of said defendant railway Co., removed to this honorable court on the -- day of ——, 1898, and since then no step has been taken to forward said condemnation proceedings.

3. That said petitioner is chartered under the laws of New York with the authority to construct, maintain and operate its said lines throughout the U. S. including the State of N. C., and has applied with the acts of Congress approved July 24th, 1866, Revised Statutes, 5263 to 5269, as will fully appear by the certificate of the Postmaster General shown to this honorable court, and is, therefore, authorized to construct its telegraph lines on all post-roads, and that said railway Co.'s right of way is, under the acts of Congress, a post-road, and that said telegraph Co. owns and operates connecting telegraph lines throughout the U. S. and Canada with connect-

ing cable lines across the Atlantic ocean, and that it already has and operates telegraph lines in the said State of N. C., and that the line now proposed to be constructed upon the right of way of said defendant railway Co. in said State will connect with its said lines heretofore constructed in said State, thereby making it a part of the great system of its lines extending throughout the U. S. as aforesaid, and that it is engaged in interstate commerce.

4. Petitioner avers that said railway Co. will not be damaged by the construction, maintenance of petitioner's telegraph line in the manner set out in the said petition, and that the said railway Co. is entitled to only nominal damages for the use of so much of its right of way for its purposes as prayed for in said petition. That nominal damages to said railway Co. will be just compensation for such use.

5. Petitioner avers that under the acts of Congress aforesaid it is entitled to the right, without obstruction, hindrance or delay, to construct its telegraph lines as prayed for in said petition. Wherefore, petitioner prays an order from this honorable court authorizing it to proceed at once, without delay to construct its said telegraph line, as prayed for in said petition, upon the execution of a bond to be approved by your honor or the clerk of this honorable court, as your honor may deem necessary to fully protect the right and interest of said railway Co., conditioned to pay such damages
42 to said defendant railway Co. as may be finally adjudged against it in said condemnation proceeding.

And, as in duty bound, will ever pray.

POSTAL TELEGRAPH-CABLE CO.,
By J. R. McINTOSH, *Agent & Att'y.*

UNITED STATES OF AMERICA, }
Western Dist. of N. C., Fourth Circuit. }

This day personally appeared the undersigned, clerk of said court, Joseph W. Kates, general superintendent of the Postal-Telegraph Cable Co., who being by me duly sworn, says the facts stated in the foregoing petition, of his own knowledge, are true, and those stated upon information and belief he believes to be true.

JOS. W. KATES, *Gen'l Supt.*

Sworn to and subscribed before me this, the 18th day of August, 1898.

C. B. MOORE, *Clerk.*

Fee paid.

Endorsed: Filed in this office Sep. 14, 1898. Sam'l L. Trogdon, clerk.

Order Authorizing Clerk to Appoint Comm'rs.

THE UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court.

THE POSTAL TELEGRAPH-CABLE CO.
vs.
SOUTHERN RAILWAY CO.

It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this district, and summons them before him. That the said persons so selected shall act as commissioners to assess the damages which the Southern Railway Company may sustain by reason of the erection of the telegraph poles and the stretching of the wires thereon of the Postal-Telegraph Cable Company, as proposed in the petition of said company to this court.

That the said commissioners shall take before the said clerk
43 the oath prescribed in section 1946 of the Code of North Carolina, and shall proceed in all respects as required in said code in assessing such damages, estimating and assessing such compensation as may be just for said Southern Railway Company by reason of the premises. The said commissioners shall hold their meetings in the court-house of the United States, in the city of Greensboro, over which meetings said clerk shall preside, and they are authorized and empowered to take such testimony in respect to the said damages to the said Southern Railway Company as they may deem pertinent, not, however, extending their inquiry as to the benefit to be derived of the telegraph Co., or the value thereof, to wit: The first meeting of the commissioners, of which the said clerk shall give due notice to them and to the parties, shall be held ten days after notice of their appointment has been served on the parties to this cause. After hearing the evidence and reaching their conclusion, the said commissioners shall reduce their award to writing and sign and seal the same and file it with the said clerk of this court at Greensboro.

CHARLES H. SIMONTON,
Circuit Judge.

15th of Sept., 1898.

Endorsed: Filed in this office Sep. 17, 1898. Sam'l L. Trogdon, clerk.

Notice Appointing Comm'rs and Calling Meeting on September 30th, 1898.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court.

THE POSTAL TELEGRAPH-CABLE CO.
vs.
THE SOUTHERN RAILWAY COMPANY.

To Alfred M. Scales, John M. Walker, and J. Addison Hodgin:

Pursuant to an order made by his honor Chas. H. Simonton, on the 15th day of September, 1898, to me directed, in the above-entitled cause, commanding me to summon three disinterested freeholders as commissioners to assess the damage of the said Southern Railway Co., which may accrue to same by the reason of the construction of a line of telegraph along the right of way by the plaintiff, The Postal Telegraph-Cable Co., and to fix a time for the assembling of said commissioners, and the taking of testimony bearing upon the issues by them to be tried; I have this day appointed as commissioners in said cause, Alfred M. Scales, John M. Walker, and J. Addison Hodgin, residents of the county of Guilford, N. C., of such appointment you will, therefore, take notice of, and you are hereby summoned to appear and sit upon the hearing of the said cause in the court-room of the U. S. circuit court in Greensboro, N. C., on September 30th, 1898, at 10 o'clock a. m., and therein fail not upon penalty of law.

Done this 19th day of September, 1898, as witness my hand and the seal of this court.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

Service of Notice Accepted.

We do hereby accept service of the within summons. This 19th day of Sept., 1898.

J. M. WALKER.
A. M. SCALES.
JAS. A. HODGIN.

Endorsed: Filed in this office Sept. 19th, 1898. Sam'l L. Trogdon, clerk.

Notice of Appointment and Meeting of Commissioners on September 30th, 1898.

THE UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court.

THE POSTAL TELEGRAPH-CABLE CO.
vs.
THE SOUTHERN RAILWAY CO.

The defendant, The Southern Railway Co., hereby take notice:

That pursuant to an order made by his honor Chas. H. Simonton, on the 15th day of September, 1898, to me directed, in the above-entitled cause, commanding me to appoint and summons three disinterested freeholders as commissioners to assess the damage of the said Southern Railway Co., which may accrue to same by reason of the construction of a line of telegraph along the right of way by the plaintiff, The Postal Telegraph-Cable Co., and to fix a time for the assembling of said commissioners, and the taking of testimony bearing upon the issues by them to be tried; I have this day appointed as commissioners in said cause Alfred M. Scales, John M. Walker, and J. Addison Hodgin, residents of Guilford county, N. C., upon whom service of summons has this day been had, requiring them to appear and sit upon the hearing of said cause in the court-room of the U. S. circuit court in Greensboro. N. C., on September 30th, 1898, at 10 o'clock a. m. Of such proceedings you will take notice and be governed accordingly.

Done this 19th day of September, 1898, as witness my hand and seal of this court.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

Marshal's Return.

Executed the within notice Sept. 19th, 1898, at Greensboro, by reading and delivering to W. E. Coffin, agent of the Southern Railway Company, a copy of this notice.

J. M. MILLIKAN,
U. S. Marshal,
Per J. A. LOGAN, *O. D. M.*

Endorsed: Filed in this office Sept. 21, 1898. Sam'l L. Trogdon, clerk.

Defendant's Bill of Exceptions No. 2.

L TELEGRAPH-CABLE COMPANY *vs.* ÜTHERN RAILWAY COMPANY. } Defendant's Bill of Exceptions No. 2.

t further remembered that on the 15th day of September, no proceedings having intervened since the proceedings set the first bill of exceptions), the court made an order directing el L. Trogdon, clerk of this court at Greensboro, to appoint commissioners to assess the damages which the Southern Rail- Company may sustain by reason of the erection of a telegraph y the Postal Telegraph-Cable Company upon the property of id railway company, as proposed in the petition of said com- filed in this cause, the powers, duties, and proceedings of said commissioners being fixed in said order, which order is in the words and figures following to wit: (Here insert order, see order on page 42 of this record); to which action, ruling, rder of the court said Southern Railway Company by coun- cepted upon the same grounds as are set forth in a paper filed 31st day of August, 1898, stating the grounds of the defend- notion to dismiss the plaintiff's petitions, and which paper is et forth in defendant's first bill of exceptions, to which refer- s hereby specially made; and upon the further grounds that rder of the 15th day of September, 1898, was prematurely d, without proper notice to said defendant, and that neither rder nor the powers, duties, and proceedings of said commis- s, as in the proceedings therein set forth, are authorized by

, pursuant to said last-mentioned order of the 15th day of nber, 1898 (no other proceedings having intervened), the said l L. Trogdon, clerk, on the 19th day of September, 1898, did tten notice or order of that date, appoint said commissioners mmon them to appear and sit upon the hearing of the cause, aid notice or order of September 19th, 1898, set forth, which or order is in the words and figures following, to wit: (Here notice or order appointing commissioners, see notice or order e 43 of this record.) And upon the same day, to wit, the ay of September, 1898 (no other proceedings having inter- the said Samuel L. Trogdon, clerk, issued a notice and served ne upon the parties to this cause, warning the said parties e had appointed said commissioners, and also appointed a nd place for them to sit upon the hearing of this cause, and ng said parties to take notice and be governed accordingly, last-mentioned notice is in the words and figures follow- wit: (Here insert notice to parties, see notice on page 44 of this , to all of which action of Samuel L. Trogdon, clerk, both in g and issuing the notice or order appointing commissioners, o in entering, issuing, and serving the notice to said parties cause, the said Southern Railway Company by counsel ex-

cepted upon the grounds hereinabove set forth, and prayed that this its second bill of exceptions be signed, sealed, enrolled, and made a part of the record in this case, which is accordingly done.

CHARLES H. SIMONTON, [SEAL.]
Circuit Judge.

4th November, 1898.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

47 *Order for Plaintiff to Show Cause on Oct. 7th, and Suspending Proceedings by Commissioners.*

In the Circuit Court of the United States for the Western District of North Carolina, at Greensboro, Fourth Circuit.

POSTAL TELEGRAPH-CABLE COMPANY
against
SOUTHERN RAILWAY COMPANY.

Proceedings for condemnation of right of way.

Order.

This day comes the defendant, Southern Railway Company, and moves for leave to file its answer to the petition filed by the plaintiff herein, as allowed by the provisions of chapter 49 of the Code of North Carolina, and under the law and practice, and also to vacate the order recited below last entered herein:

Upon consideration whereof, the court doth order that the plaintiff, Postal Telegraph-Cable Co., be required to show cause before me, at Charleston, U. S. court-room, on 7 October next, at 10 a. m., why the defendant shall not have leave to file its answer as prayed, and the former order be vacated and annulled.

And in the meantime it ordered that the said order, which authorized the clerk to appoint commissioners to ascertain and determine the compensation which ought to be made to defendant for the condemnation of its right of way, &c., be suspended, and all action or proceedings thereunder by the plaintiff and the commissioners, be likewise stayed, until the further order of this court.

A copy of this order shall be served upon A. L. Brooks, of counsel for petitioner, or, if he cannot be found, upon an agent of the plaintiff.

CHARLES H. SIMONTON,
Circuit Judge.

23 Sept., 1898.

A true copy.
Teste:
[SEAL.] SAM'L L. TROGDON, *Clerk.*

Marshal's Return.

uted Sep. 26, 1898, by delivering a copy of the within order . Brooks, agent or attorney of Postal Telegraph-Cable Co., at boro, N. C.

J. M. MILLIKAN,
U. S. Marshal,
Per T. E. McCRARY,
Chief Office, D. M.

orsed: Filed in this office Sep. 27, 1898. Sam'l L. Trogdon,

Answer of Defendant.

Circuit Court of the United States for the Western District of North Carolina, at Greensboro, Fourth Circuit.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

defendant, The Southern Railway Company, saving and re- the many grounds of objection to the proceeding of the inant and to both its petitions therein filed, for answer to the n filed in the superior court of Guilford county, North Caro- nd removed to this court, or to so much of said petition as dvised it is material for him to answer, says:

hat as to the allegations in said petition contained, with re- o the charter and incorporation of the petitioner and its authority to construct, maintain and operate telegraph lines hout the State of New York and other States of the United of America, including the State of North Carolina, as claimed out in said petition, defendant says it has no knowledge or ation sufficient to form a basis of belief, and therefore neither nor denies the said allegations, but calls for strict proof of ne.

hat, as to the effort and the failure of petitioner to secure by t or agreement the right to erect its telegraph lines upon the f way of aforesaid and for the purpose of the aforesaid "de- t railway company," as alleged in said petition, and required by the statute law of North Carolina, defendant neither ad- mits nor denies, but calls for strict proof of said allegations, and of compliance with said statute law in this regard.

hat as to the telegraph lines which the petitioning telegraph ny has already constructed, and others to be constructed, and operated by said company, and the future connections, ese lines, of its present proposed lines, if constructed as pro- nd asked in its said petitions—defendant has no knowledge, erefore neither admits nor denies the allegations of said peti- this regard, but calls for strict proof of the same—if and in s the court may deem said allegations to be relevant.

4. That as to the entire claim of the petitioning telegraph company, to condemn a right of way for its purposes, upon the property of defendant, this defendant denies that there is any law, either common or statute, existing in the State of North Carolina today, which authorizes such condemnation.

5. Defendant further and in particular denies that any such condemnation is authorized by "chapter 49 of the Code of North Carolina of 1883, and the acts of the General Assembly of said State amendatory thereof," as claimed in the said petition.

Copy.

Eminent Domain Legislation of North Carolina.

Section 2012 of the Code of North Carolina of 1883 is as follows:

"SEC. 2012. Proceedings for condemnation, appointment of commissioners, their report, exceptions thereto; appeal, final judgment, &c., to be as provided in this chapter in condemning, &c., for railroads.

"The proceedings for the condemnation of lands, or any easement, or interest therein, for the use of telegraph companies, the appraisal of the lands, or interest therein, the *the* duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in this chapter for condemning lands to the use of railroads."

This section, excluding the heading, may be abstracted as follows:

"The proceedings for the condemnation of lands, or any
50 easement or interest therein, for the use of telegraph companies, * * * shall be as prescribed in this chapter for condemning lands to the use of railroads."

The sections of the said Code of 1883 thus referred to by section 2012, so far as relevant to the defendant's present purpose, are as follows, viz:

Section 1944 of Code.

The first paragraph of section 1944 is as follows, the balance being, for the purpose in hand, unimportant:

"SECTION 1944. Petition presented; character or; names and places of residence to be given; copy of petition must be sent to superior court. 1871–'2, c. 138, s. 14.

"For the purpose of acquiring such title the said company, or the owner of the land sought to be condemned, may present a petition praying for the appointment of commissioners of appraisal to the superior court of the county in which the real estate described in the petition is situated. Such petition shall be signed and verified according to the rules and practice of such court; and, if filed by the company, it must contain a description of the real estate which the company seeks to acquire; and it must, in effect, state

ompany is duly incorporated, and that it is the intention
ipany in good faith to construct and finish a railroad from
places named for that purpose in its articles of associa-
its charter; that the whole capital stock of the company
n good faith subscribed, as required by this chapter, or by
of its charter; that the company has surveyed the line or
s proposed road, and made a map or survey thereof, by
h route or line is designated, and that they have located
road according to such survey, and filed such certificates
cation, signed by a majority of the directors of the com-
he clerk's office of the several counties through or into
said road is to be constructed; that the land described
ition is required for the purpose of constructing or oper-
proposed road; and that the company has not been able
title thereto, and the reason of such inability. The pe-
ether filed by the company or the owner of the land, must
the names and places of residence of the parties, so far as
can by reasonable diligence be ascertained, who own or
laim to own or have, estates or interests in the said real
d if any such persons are infants, their ages, or as near as
ust be stated; and if any such persons are idiots or persons
unsound mind or are unknown, that fact must be stated,
ether with such other allegations and statements of liens
incumbrances on said real estate as the company or the
y see fit to make. A copy of such petition, with a notice
e and place when and where the same shall be heard by
or court, must be served on all persons whose interests are
cted by the proceedings, at least ten days prior to the
f the same by the said court."

Section 1945 of Code.

s Made Against Petition; Freeholders Appointed to Appraise Estate. 1871–'72, *c.* 138, *s.* 15.

enting such petition to the superior court, as aforesaid,
f of service of a copy thereof, and notice as aforesaid, all or
e persons whose estates or interests are to be affected by
dings may answer such petition and show cause against
he prayer of the same, and may disprove any of the facts
it. The court shall hear the proofs and allegations of
s, and, if no sufficient cause is shown against granting the
the petition, it shall make an order for the appointment
isinterested and competent freeholders, who reside in the
ere the premises are to be appraised for the purposes of
ny, and shall fix the time and place for the first meeting
missioners.

Section 1946 of Code.

1946 is as follows:
946. Commissioners to be qualified to issue subpœnas,

administer oaths, to adjourn, to appraise and report under hands and seals; either side may file exceptions before clerk; may appeal; upon payment of sum appraised, company to enter and take possession during appeal; final judgment; court to have power to enforce judgment; land to belong to company during its corporate existence; possession of land not condemned to be surrendered to owner, &c.; costs at the discretion of judge or court. 1871-'72, c. 138, §§ 16, 17, 18.

"The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpœnas, administer oaths to witnesses,
52 and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the court or pursuant to adjournment, they shall cause ten days' notice of such meeting to be given to the parties who are to be affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly be made by the company to the party or parties owning or interested in the real estate appraised by them; and in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad. They shall report the same to the court under their hands and seals, and within twenty days after filing the same any person interested in the said land may file exceptions to said report, and, upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the supreme court. The court or judge, on the hearing, may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said company, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then, and in that event, the said company may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeals, and until the final judgment rendered on said appeal or appeals. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the company, and upon the payment by said company of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then, and in that event, all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such real estate during the corporate existence of the company aforesaid. A certified copy of said judgment, under seal of the court, shall be registered in the

ere the land is situate, and a copy of the same, or
il certified, may be given in evidence in all actions
proceedings, as deeds for land are now allowed to be
in evidence. All real estate acquired by any company
er and pursuant to the provisions of this chapter, for the
its incorporation, shall be deemed to be acquired for the
But if the court shall refuse to condemn the land, or
thereof, to the use of said company, then, and in that
money paid into court, or so much thereof as shall be
shall be refunded to said company. And the company
no right to hold said land not condemned, but shall sur-
possession of the same on demand, to the owner or
his or their agent or attorney. And the court or judge
full power and authority to make such orders, judgments
and issue such executions and other process as may be
o carry into effect the final judgment rendered in such
s. The costs in this proceeding shall be paid by either
ne judge or court in its discretion shall adjudge. The
ners shall each be entitled to three dollars per day for
ney are engaged in the performance of their duties, and
nall be taxed in the bill of costs."

Section 1952 of Code.

952 is as follows:

s 1952. Maps of route to be made; notice given to occu-
nd; superior court petitioned when route is objectionable;
n of route allowable, unless, &c.; time of certificate; com-
1871–'2, c. 138, § 24.

company, before constructing any part of their road into
any county named in their articles of association or
ll make a map and profile of the route intended to be
such company in such county, which shall be certified
sident and engineer of the company, or a majority of the
nd filed in the office of the clerk of each county through
road is to be made. The company shall give a written
l actual occupants of the land over which the route of
so designated and which has not been purchased by, or
ne company, of the route so designated. Any party feel-
ved by the proposed location may, within fifteen days
ing notice as aforesaid, apply to the superior court by
ly verified, setting forth his objections to the route desig-
the said court may, if it considers sufficient cause there-
appoint three disinterested persons, one of whom must
practical engineer, commissioners to examine the pro-
d route, and after hearing the parties, to affirm or alter
same as may be consistent with the just rights of all
the public, but no alteration of the route shall be made
the concurrence of the commissioner who is a practical
neer. The determination of the commissioners shall,
rty days after their appointment, be made and certified
nd their certificate filed in the office of the county clerk.

Said commissioners shall each be entitled to three dollars per day for their expenses and services, to be paid by the person who applied for their appointment, and, if the proposed route of the road is altered or changed by the commissioners, the company shall refund to the applicant the amount to — paid."

Sections 1944, 1946 and 1952 have been amended or changed by the following acts:

Chapter 160, Acts of 1891.

An act to amend section one thousand nine hundred and forty-six of the Code, in relation to the assessment of damages.

The General Assembly of North Carolina do enact:

SEC. 1. That section one thousand nine hundred and forty-six of the code be, and the same is hereby, amended by striking out all after the word "them" in line twenty-one of said section down to and including the word "railroad" in line twenty-four: "Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages of said land, then the said railroad company shall pay the costs of the proceeding, and shall not have a judgment for the excess of benefits over the damages."

SEC. 2. This act shall be in force from and after its ratification.

Ratified the 25th day of February, A. D. 1891.

Chapter 396, Acts 1893.

"An act to amend chapter forty-nine of the Code, in relation to condemning land for right of way for railroads.

"The General Assembly of North Carolina do enact:

"SEC. 1. That section one thousand nine hundred and forty-four of chapter forty-nine of the Code be amended by striking out in said section all from the word 'charter' in line sixteen of said section down to and including the word 'constructed' in line twenty-four thereof.

55 "SEC. 2. That (section) one thousand nine hundred and fifty-two of chapter forty-nine of the Code be repealed, and the following substituted in lieu thereof: That whenever it shall become necessary to condemn any land for the purposes of a railroad that at the time that the summons for such condemnation is served, there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the heights of the embankments on the land so sought to be condemned, and at what points on such land such cuts and embankments are located.

"SEC. 3. That section one thousand nine hundred and fifty-three of chapter forty-nine of the Code be amended by striking out from the word 'thereby' in line four down to and including the word 'change' in line seven of said section.

"SEC. 4. That this act shall not affect any pending litigation.

"SEC. 5. That this act shall be in force from and after its ratification.

"Ratified the 6th day of March, A. D. 1893."

Language Stricken from Section 1944 *by Act of* 1893.

In other words, the legislature amended and changed section 1944 by striking out the following words, viz:

"That the company has surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company, in the clerk's office of the several counties through or into which the said road is to be constructed."

Language Stricken from Section 1946 *by Act of* 1891.

And the legislature amended and changed section 1946 by striking out the following words, with a single saving clause—the proviso being now given in italics, viz:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

The proviso is as follows:

56 "*Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damages.*"

Section 1952 was repealed, and the second section of chapter 369, Acts of 1893, copied above, substituted in lieu thereof.

Sections 1944, 1946 and 1952, of the Code of North Carolina, appeared in chapter 49, as above printed at full length, when section 2012, of chapter 49, provided that:

Upon the above view of chapter 49 of the Code of North Carolina of 1883, and the amendments thereof, defendant is advised:

First. That section 2012 neither referred to nor adopted any of said amendments, and therefore the petitioning telegraph company's proceeding is not authorized by nor based upon said amendments, and

Second. That chapter 49 of the Code, or, at least, the substantive sections and features of the law as it stood in the Code of 1883 has been repealed, or, at least, so radically changed and altered by said amendments that said original sections of chapter 49 no longer furnished legal basis or authority for the petitioning telegraph company's proceeding.

Indeed, defendant is advised and submits that said amendments amount to a legal prohibition against a condemnation proceeding by a telegraph company under and pursuant to the original sec-

tions of chapter 49 of the Code as they stood prior to said amendments.

6. The petitioning telegraph company seeks, in one proceeding, to condemn a right of way for its purposes upon the property of this defendant, for a distance of over two hundred miles and extending through many counties; which mode of procedure, as defendant is advised and believes, is based upon sec. 2010 of the Code of North Carolina of 1883, and especially upon the last five lines of said section, which provides as follows: "And if the right claimed be over or upon an easement or right of way which extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such easement or right of way extends."

57 The allegations of the said petition in this regard are as follows, to wit:

"Your petitioner * * * desires to construct, maintain and operate a line of telegraph, along and upon the right of way of the Southern Railway Company, from a point on the State line between the States of North Carolina and Virginia, where said railroad right of way crosses said State line, thence south through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarrus and Mecklenburg, to the town of Charlotte, in said last-named county, and from the town of Greensboro, in the said county of Guilford, to the city of Raleigh, in said State, passing through the counties of Guilford, Alamance, Orange, Durham and Wake, the whole distance being about 193 miles."

This defendant denies that the above allegation, either taken alone or in connection with any other allegation in the said petition, amounts to a distinct and legally sufficient statement of what is required in sec. 2010 above referred to, as to the character of defendant's property, in order to give the court jurisdiction in one proceeding to condemn defendant's property in all the counties mentioned; and, if the court shall be of opinion that said allegation, either taken alone or in connection with any other allegation in said petition, is legally sufficient and adequate to the purpose aforesaid, then this defendant takes issue in fact with said allegation or allegations of said petition, and states that a large portion of the lands of this defendant along and upon which the petitioning telegraph company seeks to condemn the right of way for its purposes in the various counties specified in its said petition, is held by this defendant in fee-simple—the said land having been acquired by purchase from the original owners under deeds conveying to this defendant fee-simple title to the same,—a title as complete and absolute as that of any citizen who has purchased land and taken a deed for the same in fee-simple.

This defendant is advised and submits that neither sec. 2010, above referred to, nor any other section of this, or any other statute of the State of North Carolina, contains any warrant for condemning in one proceeding, lands of a railroad company in several counties, held by said railroad company by fee-simple title.

7. The complainant's petition states that "said poles will be so

erected and said telegraph line so constructed and maintained, as not to obstruct the usual travel and business of said railroad
58 company, nor in any way interfere with the operation of said company, nor with any telegraph line now constructed on said right of way;" but this defendant denies the truth of said statement, and declares that said poles erected and said telegraph line constructed and maintained, as set out in detail in said petition, will obstruct and hinder the usual travel and business of this defendant, and will interfere with the operation of this defendant's railroad company, and with the telegraph line now constructed upon this defendant's property; and this defendant further declares that it will not be possible to construct and maintain a line of telegraph upon its property, as set out in said petition, in such a manner as not to obstruct or hinder the usual travel upon defendant's said railroad.

—. Further answering, this defendant says that neither the Code of North Carolina of 1883, nor any amendment thereof, contemplates or authorizes the condemnation by a telegraph company for its purposes of such an indefinite, uncertain, changing, wobbling right of way as is described and sought to be condemned by the petitioning telegraph company in its said petition, and that such a proceeding and such a right of way wholly violates that clearness, accuracy, and certainty as to metes, bounds, location, uses, and the like contemplated by said statute law of North Carolina.

9. Defendant, further answering, says that said statute law of North Carolina does not contemplate or authorize the condemnation by a telegraph company for its purposes of a right of way based, as set out in said petitioning telegraph company's petition, partly upon condemnation and partly upon contract; and said defendant further denies that said petition describes and asks the condemnation of such a right of way as said statute law of North Carolina does authorize and contemplate; if indeed it can be held to authorize any condemnation whatever of the property of a railroad company by a telegraph company—which this defendant denies.

10. Further answering, this defendant says, that so emphatic has the law of North Carolina ever been with regard to the above-mentioned requisites, the definiteness and certainty, and notice as to the precise location, metes, bounds and descriptions of the right of way which it authorized to be condemned, that three times over it has embodied a distinct requirement of a map or chart of such right of way, and however said statute has been amended as to the details of said requirement, it has been rather strengthened
59 than weakened throughout said successive amendments; that section 1952, above quoted, opens with the following sentence:

"Every company, before constructing any part of their road into or through any county named in their articles of association or charter, shall make a map and profile of the route intended to be adopted by such company in such county, which shall be certified by the president and engineer of the company, or a majority of the

directors, and filed in the office of the clerk of each county through which the road is to be made."

That section 1944, above quoted, requires that the petition presented to court for the purpose of acquiring title to a right of way for the purposes of the petitioning company shall state:

"That the company has surveyed the line or route of the proposed road and made a map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company, in the clerk's office of the several counties through or into which the said road is to be constructed."

And, while section 1952 has been repealed and section 1944 amended by striking out the language quoted, yet the act of 1893, chapter 396, which enacted such striking out and such repeal, substituted in the place of the said section, and the said language thus stricken from the statute book, the following yet stronger provision:

"That whenever it shall become necessary to condemn any land for the purposes of a railroad that, at the time that the summons for such condemnation is served, there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the heights of the embankments on the land sought to be condemned, and at what points on such land such cuts and embankments are located."

This defendant is advised that these requirements of maps, surveys, locations, etc., are indispensable, indeed, jurisdictional, requirements, and have been held to be such by the supreme court of North Carolina; and yet——

No map was served upon this defendant, the railroad company, with the petition of the telegraph company; no survey of its proposed route has been made by the telegraph company; no map upon which such route is designated has been made; no location of such route has been made, and no certificates of location have been signed by a majority of the directors of the telegraph Co. and
60 filed in the clerk's offices of the counties through which it is proposed to extend such route. In a word, this defendant is advised and submits that the entire proceeding of the petitioning telegraph Co. thus far has been without warrant of law and in the teeth of the most vital and emphatic requirements of the statute law of North Carolina.

The above requirements would seem to be of the very spirit and essence of the statute; and, if it be suggested that they are inapplicable to telegraph companies in their present form, this defendant is advised that such a suggestion is but another indication of the soundness of the position for which it contends, to wit: that the North Carolina railroad law of eminent domain is incapable of being applied to the case of telegraph companies without being recast and adopted to that purpose by the legislative hand.

11. Further answering, defendant denies "that the right of way"

this defendant is "about 100 feet wide, and it extends about 50 et from a line along the centre between the rails of said main ack;" on the contrary, defendant states that the strip of land ong which its tracks are laid and its trains are run varies greatly width at different points along its line, and that at sundry oints along said line included in and covered by the condemnation roceedings of the plaintiff is much less than 100 feet in width, ndeed, is so narrow that to erect a telegraph line thereupon in the anner set out in said petition would be impracticable, or, at least ould grossly imperil the safe operation of defendant's railroad and rossly obstruct or hinder the usual travel thereupon.

12. Said petitioning company's petition makes the following tatement: "The said defendant railroad company is duly incor- orated, doing business by virtue of its charter with a right of way f 100 feet in width, obtained by enactments of the General Assembly f this State for railroad purposes alone."

Defendant submits that said allegation is indefinite, uncertain nd obscure. As to the statement that the right of way of this de- endant is 100 feet in width, defendant repeats the denial and the tatement just above made in answer to a similar allegation in said etition. If said allegation means, or is intended to convey the eaning, that the charter of this defendant was obtained by enact- ents of the General Assembly of North Carolina, then defendant enies the truth of this statement, and states that, on the contrary, s said charter was obtained by enactment of the General Assembly of the State of Virginia. But, if said allegation means, or is 1 intended to convey the meaning, that "the right of way" of this defendant was obtained by enactments of the General As- embly of the State of North Carolina, this defendant denies the ruth of this statement also, inasmuch, as above set forth, much of he property of this defendant and of the strip of land upon which s tracks are laid and its trains are run, throughout the several ounties specified in said petition of the telegraph company, is held y this defendant by fee-simple title, derived under deeds of pur- hase from the original owners of said land.

12. Said petition of the telegraph company contains the follow- ng allegations: "Said telegraph lines when constructed will in no ay damage the property of said railroad company, nor impair nor iminish the value of said right of way for railroad purposes, but hat the same will be beneficial to said railroad Co., and its atrons." Defendant is advised that said allegation is rather a con- lusion of law than a statement of fact; but, whichever it may be, efendant meets said allegation with a denial of its truth as a state- ent of facts and of its soundness as a conclusion of law. And, in rther answering the said allegation, which defendant is advised s put forward as a basis upon which to claim or to argue that noth- ng more than "nominal damages" should be allowed to this efendant, as compensation to it for the condemnation of its prop- rty by the petitioning telegraph Co., for its purposes—this defend- nt says that, not only would "nominal damages" not be to this efendant that "just compensation," which the supreme law of the

land guarantees to the citizen when his property is taken for public use, but, such "just compensation" for such condemnation of the property of this defendant as is contemplated and sought in the said petition of the plaintiff, would amount to a very large sum of money—a sum much larger, indeed almost incalculably larger, than the jurisdictional limit of this court; indeed, defendant states that the damages to its property from the condemnation sought in said petition of the telegraph Co., would amount not less to a sum of $300 per mile of such right of way, or an aggregate for the entire 200 miles of not less than ($60,000) sixty thousand dollars.

The law of North Carolina, as at present it stands amended, contemplates the estimation of three elements in arriving at "just compensation" for the taking of the property of the citizen for public use, to wit: the loss and damage to the defendant resulting from the taking; the benefits to defendant's land resulting from
62 the construction of the proposed railroad, and the benefits to the complainant resulting from the same source. This will more clearly appear from the following review of the legislation upon the subject. The phraseology of sec. 1946, prior to its amendment, was as follows:

"In determining the amount of such compensation, they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

These words clearly mean that the amount the citizen is to receive by way of compensation for his property, taken for public use, is to be measured by the extent to which his property is damaged by such "taking;" and they further mean that there is not to be offset against such "damages," any real or supposed "benefits" which may accrue to the property of the citizen from the construction of the proposed railroad or other improvement.

The amendment introduced by the law of 1891, consisted in "striking out" and repealing the clause above quoted, and inserting the following proviso:

"Provided, however, that if in any case the benefits to the land, caused by the construction of said railroad, be ascertained to exceed the damages to the said land, then said railroad company shall pay the costs of the proceeding, and shall not have a judgment for the excess of benefits over the damages."

The sole advantage resulting to the citizen from this proviso is the assurance that the condemning company shall not have a judgment against him for the excess of the benefits over the damages. He has lost, however, the protection afforded him by the law, as it originally stood in section 1946 of the Code—which authorized him to prove the entire amount of his "damages," without the same being offset or reduced by any real or supposed "benefits" estimated to have accrued to his property by the public improvement to be constructed upon it.

This compensation clause, as it originally stood in section 1946 of the Code, forbade the commissioners to make "allowance or deduction on account of any real or supposed benefits which the

es in interest may derive from the construction of the proposed
ad."

e calculation was then a very simple one, embodying but a
e element, to wit: the "damage" to the land of citizen result-
rom the "taking" of it, or a part of it, for public use.

When, however, the General Assembly struck this clause of prohibition from the statutes, the two elements above mentioned, to wit: the "benefits" to the defendant resulting the construction of the proposed railroad, and the "benefits" e complainant resulting from the same source (which had been ided), again took their natural place and effect as elements erly and necessarily entering into the estimation and calcula- of "just compensation" to the citizen. Under the act of 1891, e copied as "chapter 160, Acts of 1891," the railroad must be as compensation what the privilege is worth to the telegraph hat is, for the benefits which may be estimated to accrue to elegraph Co., therefrom.

the law of '83—when a railroad takes the property of a citizen ts purposes, and the question of "just compensation" arises, a single element is or can be considered, and that is the extent ich the defendant's property is damaged by the "taking;" and "damages" can neither be reduced by offsetting against them benefits" estimated to accrue to the defendant's property from onstruction of the proposed improvement, nor increased by g to them the amount of the "benefits" estimated to accrue e condemning company from the same cause. But in the law , the General Assembly has completely changed its mind and sition, and determined that all these elements ought to be, and be considered: and this defendant is advised that such is un- bly the law of North Carolina today, as regards compensation e citizen, when a railroad takes his property. But defendant ther advised that the amendment of 1891, which introduced tate of the law, has no application to a telegraph company, , if allowed to condemn at all, is allowed or required to pay a pensation" estimated by the very different measure of the of '83.

fendant is, however, yet further advised, infers and respectfully its, that the legislature never intended to authorize or to re- a condemning railroad company to apply and to pay one ure of compensation and a condemning telegraph company a lly different one; from which conflict and contrariety in the his defendant is yet further advised, infers and respectfully its that:

t there is no law existing on the statute book of North Carolina by which a telegraph company is authorized to condemn either a ad right of way or the fee-simple lands of a railroad company.

erefore, defendant asks that it be adjudged that the plaintiff is not entitled to the relief demanded in the petition, nor to any judgment against the defendant, and that the defendant

may be adjudged to have such other and further relief as it may be entitled to, and to recover its costs, &c.

STILES & HOLLADAY AND
F. H. BUSBEE,
Solicitors & Counsel for Def't.

IN THE U. S. CIRCUIT COURT, }
At Asheville, N. C., } *ss:*

C. H. Hudson, being duly sworn, saith that he is the chief engineer of the defendant, Southern Railway Company; that the foregoing answer is true, except where the allegations are made upon information and belief, and as to those he believes to be true.

C. H. HUDSON.

Subscribed and sworn to before me this the 31 August, 1898.
C. B. MOORE, *Clerk.*

Endorsed: Filed in this office Octo. 12, 1898. Sam'l L. Trogdon, clerk.

Demurrer to Defendant's Answer.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit.

POSTAL TELEGRAPH-CABLE COMPANY }
vs.
SOUTHERN RAILWAY COMPANY. }

To the Honorable Chas. H. Simonton, circuit judge:

Said Postal Telegraph-Cable Company, by its attorney, in obedience to an order made and entered by this honorable court at chambers on the 23rd day of September, 1898, to show cause on this day why the defendant railway company shall not have leave to file its answer as prayed, and the former order authorizing the appointment of commissioners to assess the damages to which the said defendant railway company may be entitled against the said telegraph company for the right to construct, maintain and operate its telegraph lines over the right of way of the said defendant railway company, as prayed for in its petition filed in the superior court of Guilford county, and removed upon application of the said
65 defendant railway company to this court; beg leave most respectfully to state that this honorable court proceeding in this matter under and according to the statute laws of the State of North Carolina, in such cases made and provided, did heretofore at chambers, in the city of Asheville, in said State of North Carolina, on the — day of ——, 1898, hear a demurrer filed by the said defendant railway company to the petition of the said telegraph company, and afterwards on the 9th day of September, 1898, your honor, in rendering an opinion upon the said matter, carefully reviewed the many grounds of demurrer assigned by the said railway company to the proceeding on the part of said telegraph company, and

and overruled the same. Your honor using in said opinion
owing language:
he petition vague and indefinite in any respect? It asks a
way over the right of way of the railway company—a well-
and well-known subject—under whatever tenure it may be
ove all thoroughly known to the railway company. It dis-
specifies what part of the right of way is desired—so many
m the outer edge of the right of way, or anywhere in which
d not obstruct or impede the use of its track. All subject to
visions of section 2007, that the line be so constructed, and
nstruction be so maintained as not to obstruct or hinder the
ravel on the railway. This is a condition inherent in the

e cause has been heard as it were on general demurrer, at
demurrer going to the merits of the case. No facts are in
, and the question of law controls. No answer over is neces-

eason of that adjudication, your respondent says the said de-
t railway company should not have leave to file any answer
stage of the proceeding, and the former order should not be
l and annulled.
respondent respectfully insists that under the laws of North
a it has the right to maintain these proceedings, that under
ws, there are three conditions only necessary to authorize the
n the part of a telegraph company, namely:
. That it is incorporated.
d. That no agreement on application could be obtained by
graph company for the securing of said right of way.
d. That it has given security for cost.
And respondent says that each and every one of those
matters were distinctly set forth by averment in its petition
filed in the said superior court of Guilford county, and were,
re, admitted to be true by the demurrer of the said defendant
company to the same.
ises considered, respondent, therefore, says that the only pur-
at an answer would serve would be to longer postpone and
he petitioner in securing the rights accorded to it by the
laws of North Carolina; and that every matter of defense
ore set up by the said defendant railway company to the
of the said telegraph company is now *res adjudicata*, and it
be trifling with the dignity and intelligence of this court to
present them for further consideration.
ectfully submitted.

J. R. McINTOSH &
A. L. BROOKS,
Att'ys for Telegraph-Cable Co.

orsed: Filed in this office Oct. 12, 1898. Sam'l L. Trogdon,

Opinion Sustaining Demurrer to Answer.

In the Circuit Court of the United States for the Western District of North Carolina. In the Circuit Court, Fourth Circuit. In Equity.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

The defendant, at the hearing of this case on petition at Asheville, interposed a demurrer to dismiss the complaint, because the facts stated therein disclosed no cause of action. The demurrer was overruled, and an order was made providing for the appointment of commissioners. At a later date, defendants came in and asked leave to answer, and to this end the order be vacated.

The order passed upon overruling the demurrer was based upon a construction of the code of North Carolina of 1883, which left in the discretion of the court the privilege of answering over. This, however, is not in accordance with the law of North Carolina. "After the decision of a demurrer, the judge shall, if it shall appear that the demurrer was interposed in good faith, allow
67 the party to plead over upon such terms as may be just (Code, section 272). There can be no doubt as to the good faith of the demurrer. This section has been construed to give the defendant the right to answer over, upon overruling the demurrer. (Moore *vs.* Hobbs, 77 No. Ca., 65; Brownson *vs.* Insurance Co., 85 No. Ca., 411.) In this last case it was held that it was not proper to interpose the condition that the costs be paid.

In Morris *vs.* Gentry, 89 No. Ca., 249, this right to answer over was sustained, even after demurrer overruled in the supreme court.

The order for the commissioners is vacated, and leave is given to defendant to answer over.

Exercising this right the defendant has answered.

The answer, after setting up very many grounds of defence heretofore passed upon, and therefore now overruled, adds another. It avers that very many sections of the land over which the road runs, and which the petitioner seeks to condemn, are owned in fee-simple by the defendant. That thus the petitioner does not seek to condemn a right of way upon an easement only, but it also seeks to condemn the land of defendant. This being so, condemnation proceedings must be had in the county to which the land lies, Code of No. Ca., sec. 1944. The provision of the code which authorizes proceedings in one county, only, applying only to the condemnation of the easement.

The language to be construed is in section 2010 of the Code, and in the proviso. It is in these words:

"Provided, that only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right claimed be over or upon an easement, or right of way which extends into or through more counties than one, the whole

ontroversy may be heard and determined in one county
ough which such easement or right of way extends."
tioner demurs to the answer and the question of con-
ust be met.

meant by the words "easement or right of way"? Are
right of way" synonimous with—the alternative of the
ment" or do they mean two different things?

lly and strictly, a way is the passage over the lands of
ight of way is the right to use this passage. Williams
Union R'y Co., 50 Wis., 71; 21 Am. & Eng. Ency. of

tion taken by the defendant is very nice and ingenious.
create conviction of its soundness. Yet it is most diffi-
to answer.

opularly speaking the right of way of a railroad com-
, that which is understood when the term is used, is the
hat part of the land on each side of it used and possessed
pose of passing through the country from one point to
Anderson, in his Law Dictionary, says: "By right of
erally meant a private way which is an incorporeal here-
f that class of easements in which a particular person
on of persons has an interest and a right, though another
e owner of the fee in the land in which it is claimed.
ge which one person or description of persons may have
over the land of another in some particular line.
ng to a railway, a right of way is a mere easement in the
hers, obtained by lawful condemnation to the public use
ase. It is a way over which the company has to pass
ration of its trains. The term includes land acquired
y side tracks and turnouts and the improvements thereon.
s refers to the mere intangible right of crossing. Often
which the company appropriates for its use and upon
ilds its road-bed." Keener *vs.* Union Pac. R'y, 31 Fed.

another view of this question. The rule in the construc-
utes is to give to every word force and effect. Applying
re, we would not, unless forced to do so, conclude that
mean the same thing, convey the same idea. The word
ould have fully conveyed the idea of an incorporeal
t as distinguished from the fee in the land and the use
ds "or right of way" would not only be tautological,
ng.

itself uses these words in such a way as to induce the
that they do not convey the same idea. In section 150
railroad, plank road, turnpike or canal company shall
or presumed to have conveyed any real estate, right of
ent, leasehold or other interest in the soil which may
ondemned or otherwise obtained for its use as a right of
station-house or place of landing by any statute of
r by occupation of the same by any person whatever,"
ction 2009 of the Code "Such telegraph company shall

be entitled to the right of way over the lands, privileges and easements of other corporations." And this section 2010 uses similar language.

Indeed, it may be questioned if a railroad company or-
69 ganized as a corporation for the specific purpose of running and operating a railroad, can have in its right of way any other title, except for these purposes and so long only as they are preserved.

1 Redfield on Railways, 218, sec. 61, ch. X.

If this be so, the whole right of way is but an easement.

There is yet another view. There can be no doubt that the right of eminent domain, being a high, and at times harsh, exercise of the sovereign power, the form of proceeding prescribed by statute must be strictly pursued. The necessity for and the right to its exercise must exist and be shown, and the mode of its exercise must be rigidly followed. At the same time, when it is given for the promotion of a great public benefit, in its use of the gift the corporation should not be harrassed and hindered by narrow and technical construction of the words of the statute, nor should such a construction by adopted as will make the gift wholly impracticable and valueless.

If this plaintiff be compelled to go into every county through which the railway company has built its way, and there seek the relief it seeks here, its interests will be put into the hands of very many boards of commissioners, whose conclusions would be naturally conflicting, perhaps contradictory. The enterprise of a telegraph company, now one of the necessities of the commercial world, will be delayed, hampered, perhaps defeated.

The demurrer to the answer is sustained.

(Signed) CHARLES H. SIMONTON,
Circuit Judge.

17 Oct., 1898.

Endorsed: Filed in this office Octo. 18th, 1898, at 2 o'clock p. m. Sam'l L. Trogdon, clerk.

Order Sustaining Demurrer and Reinstating Order Dated September 15th, 1898.

UNITED STATES OF AMERICA:

United States Circuit Court, Eastern District of Virginia.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

This day came the defendant railway company and by leave of court filed its answer to the complainant's written notice and
70 motion, to which said answer the plaintiff telegraph company demurred, and after argument of counsel, and the matter being duly considered by the court, said demurrer is hereby

nd the defendant having asked leave to introduce testi-
ining the averments of its answer, which leave was re-
e court—
efore ordered, that the former order made by this court,
ie clerk of this court at Greensboro, North Carolina, to
amissioners to assess the damages in the above-entitled
reby reinstated; and the clerk of this court is directed
not earlier than ten days after the entry of this order
ting of said commissioners, to all of which action of the
ot leave of the court to the defendant to file its answer,
ant excepts.

CHARLES H. SIMONTON,
Circuit Judge.

898.

l: Filed in this office Octo. 26, 1898. Sam'l L. Trogdon,

ocket Entry Following Record of the Above Order.

ndants, The Southern Railway Company, appeals from
of the court and from all former orders made in said
e telegram of F. H. Busbee, on file.) This Nov. 3, 1898.
SAM'L L. TROGDON, *Clerk.*

tice to Commissioners to Meet on Nov'r 3rd, 1898.

TATES OF AMERICA, }
District of No. Ca. }

uit Court, Fourth Circuit, at Greensboro, October 24th, 1898.

L TELEGRAPH-CABLE COMPANY } Notice to Commissioners
vs. } to Meet on November
THERN RAILWAY COMPANY. } 3rd, 1898.

Sales, J. M. Walker, and Jas. A. Hodgin, commissioners
bove entitled case:

You are hereby summoned and directed to appear and be
he court-room in the U. S. building at Greensboro, N. C.,
November 3rd, 1898, at 10 o'clock a. m., at which time
a hearing will be had by you for the purposes expressed
er of his honor, Charles H. Simonton, authorizing your
nt and in the notice heretofore served on you.
my hand and seal of this court, October 24th, 1898.
] SAM'L L. TROGDON, *Clerk.*

Marshal's Return.

ted by reading and delivering a copy of the within no-
s. A. Hodgin, J. M. Walker and A. M. Scales, at Greens-

J. A. LOGAN, *O. D. M.*"

Endorsed: Filed in this office Nov. 25th, 1898. Sam'l L. Trogdon, clerk.

Notice to Parties of Meeting of Comm'rs on Nov. 3rd, 1898.

UNITED STATES OF AMERICA,
Western District of North Ca.

In the Circuit Court, Fourth Circuit, at Greensboro, October 24th, 1898.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY. } Notice of Condemnation Proceedings.

To the above-named parties and their attorneys:

You will take notice that the hearing by the commissioners, appointed in this cause, for the purposes expressed in the order of his honor, Charles H. Simonton, and in the notice heretofore given you, which hearing was stayed by a further order of his honor, Charles H. Simonton, will now proceed, and that said hearing will be had in the court-room in the U. S. building in Greensboro, N. C., on Thursday, November 3rd, 1898, at 10 o'clock a. m., of which hearing you will take notice.

Witness my hand and seal of this court, Octo. 24th, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

72 *Marshal's Return.*

"Executed Octo. 24th, 1898, by reading and delivering a copy of within notice to W. E. Coffin, agent of Southern Railway Co., at Greensboro, N. C.

J. A. LOGAN, *U. D. M.*"

Endorsed: Filed in this office Octo. 25, 1898. Sam'l L. Trogdon, clerk.

Notice to Commissioners Continuing Hearing Set for Nov. 3rd, '98.

UNITED STATES OF AMERICA,
Western District of No. Ca.

In the Circuit Court, Fourth Circuit, at Greensboro.

THE POSTAL TELEGRAPH-CABLE CO.
vs.
THE SOUTHERN RAILWAY COMPANY. } Notice Continuing Condemnation Proceedings by Commissioners on November 3rd, 1898.

To A. M. Sales, J. M. Walker, and Jas. A. Hodgin, commissioners in the above-entitled cause:

You are hereby notified that the hearing to be had on November 3rd, 1898, notice of which has been duly served on you, is hereby

continued until further notice may be given you, fixing another date for said hearing in the above-entitled cause.

Witness my hand and seal of this court, Octo. 29th, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

Service of Notice by Mail.

The above paper served by mailing a certified copy to each of the above-named commissioners.

10, 31, 1898.

SAM'L L. TROGDON, *Clerk.*

Endorsed: Filed in this office Octo. 31st, 1898. Sam'l L. Trogdon, clerk.

73 *Notice to Parties Continuing Hearing Set for Nov. 3rd, 1898.*

UNITED STATES OF AMERICA,
Western District of N. C.

In the Circuit Court, Fourth Circuit, at Greensboro.

THE POSTAL TELEGRAPH-CABLE COMPANY *vs.* THE SOUTHERN RAILWAY COMPANY. } Notice Continuing Condemnation Proceedings by Commissioners on Nov'r 3rd, 1898.

To the above-named parties and their attorneys:

You will take notice that the hearing to be had on November 3rd, 1898, by the commissioners appointed in this cause, notice of which hearing has heretofore been given you, is hereby continued until further notice may be given you fixing another date for said hearing in the above-entitled cause.

Witness my hand and seal of this court Octo. 29th, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

Marshal's Return.

"Received Octo. 29th, 1898. Executed Octo. 29th, 1898, by reading and delivering a copy of this notice to W. E. Coffin, agent for the So. R'y Co., at Greensboro.

J. M. MILLIKAN,
U. S. Marshal,
By J. M. BALEY, *Deputy.*"

Endorsed: Filed in this office Octo. 31, 1898. Sam'l L. Trogdon, clerk.

Defendant's Bill of Exceptions No. 3.

POSTAL TELEGRAPH-CABLE COMPANY *vs.* SOUTHERN RAILWAY COMPANY. } Defendant's Bill of Exceptions No. 3.

Be it remembered that on the 23rd day of September, 1898, the court having, upon the application of the defendant, required the plaintiff to show cause on the 7th of October, 1898, why the defendant should not have leave to file its answer to the petitions
74 filed by the plaintiff in the cause, and why the aforesaid order of September the 15th, 1898, should not be vacated and annul-ed (no other proceedings having intervened since those set out in defendant's second bill of exceptions), and the parties, plaintiff and defendant, having appeared before the court on said 7th day of October, 1898, and the defendant having then by leave of court, filed its answer to said petitions of the plaintiff, and the plaintiff having then and there demurred to the defendant's answer, the court took time to consider, and on the 24th day of October, 1898, delivered a written opidion, and entered an order in said cause, which said opinion and order are in the words and figures following, to wit: (Here insert opinion and order of the court. See opinion on page 66, and order on page 69 of this record); to which action, ruling, order and judgment of the court, sustaining the plaintiff's demurrer to the defendant's answer, refusing and denying defendant's motion to introduce testimony supporting the averments of its answer, reinstating the order made by the court on September the 15th, 1898, directing the clerk of this court at Greensboro, to appoint commissioners to assess the damages in this cause, and directing said clerk to fix a day not earlier than ten days after the entry of said order of October 24th, 1898, for the meeting of said commissioners, the defendant by counsel excepted.

And thereupon said Samuel L. Trogdon, clerk, having, on said 24th day of October, 1898, made an order summoning the commissioners heretofore appointed by him to assemble and go on with the hearing of the cause, and also issued a notice to the parties to the cause to attend said hearing, which order and notice are in the words and figures following, to wit: (Here insert order and notice of the clerk. See order on page 70, and notice on page 71 of this record); to all this above-recited action of said Samuel L. Trogdon, clerk, the defendant by counsel also excepted, and prayed that this, its third bill of exceptions, be signed, sealed, enrolled, and made a part of the record in this cause, which is accordingly done.

CHARLES H. SIMONTON, [SEAL.]
Circuit Judge.

4 November, 1898.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

75 *Order Making Defendant's Exceptions a Part of the Record.*

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

The defendant, having at the time of their entry, excepted to the following orders of this court in this cause, and the court having duly noted each, every and all of said exceptions, viz:

1. The order overruling defendant's demurrer and motion to dismiss (containing sixteen assignments) because the complaint did not set forth facts sufficient to constitute a cause of action, the exception of the defendant being to the action of the court in overruling each of said grounds of demurrer and each of said grounds to dismiss as aforesaid.

2. The order of the court herein, dated September 15th, 1898, directing the clerk of this court at Greensboro, North Carolina, to appoint three disinterested commissioners to assess damages as therein set out, prescribing the oath to be taken by said commissioners and directing the mode of procedure and the principles and rules by which said commissioners shall be governed, their place of sessions and how they shall be presided over, the elements which said commissioners shall consider and the form and substance of the report to be made by them, to each and all, and every of which rulings and directions of the court the defendant excepted; the said exceptions being intended to cover each, all and every ruling contained in the said order, and the said order in all of its parts and provisions.

3. The order made by Samuel T. Trogdon, clerk of this court at Greensboro, appointing Alfred M. Scales, John M. Walker and J. A. Hodgin as commissioners to assess the damages of said defendant, as set out in said order, dated September 19th, 1898, and fixing the time and place for the meeting of the said commissioners, and the exceptions of the defendant being intended to cover the aforesaid ruling and action of the said clerk and being intended as exceptions to the said order in each, all and every of its provisions.

4. The order of the court made on the 24th day of Octo-
76 ber, 1898, sustaining plaintiff's demurrer to the answer filed by the defendant, and refusing and denying to the defendant leave to introduce testimony sustaining the averments of its answer and reinstating the aforesaid order made by this court on the 15th day of September, 1898, and directing the clerk of this court to fix a day for the meeting of said commissioners heretofore appointed by him as aforesaid, to all of which rulings contained in the said order of October 24th, 1898, the defendant excepted, the said exceptions being intended to cover each, all and every ruling

contained in said last-named order, except the leave given by the court to the defendant to file its answer.

Thereupon, it is ordered, that the exceptions of the defendant be made a part of the record herein, which is hereby done; and the defendant has leave to file its bill of exceptions, if it be so advised at any time within twenty days.

CHARLES H. SIMONTON,
Circuit Judge.

Oct. 24, 1898.

Endorsed: Filed in this office Oct. 26, 1898. Sam'l L. Trogdon, clerk.

Notice of Appeal.

In the United States Circuit Court for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

To the Postal Telegraph-Cable Company, the plaintiff above named:

Please take notice that The Southern Railway Company, the defendant above named, appeals from the order made in the above-entitled cause by his honor, Charles H. Simonton, on October 24th, 1898, which order sustains the plaintiff's demurrer to the defendant's answer to the petition of the plaintiff, and denies the defendant the right to take testimony, and reinstates the order of September 15th, 1898, directing the clerk to appoint commissioners, &c., as will fully appear from the said order.

The defendant also appeals from all prior and intermediate orders made in said cause.

STILES & HOLLADAY,
F. H. BUSBEE,
Counsel for Defendant.

Nov. 3rd, 1898.

77 *Marshal's Return.*

"Received Nov. 4, 1898. Executed Nov. 4, 1898, by reading and delivering a copy of the notice to A. L. Brooks.

J. M. MILLIKAN,
U. S. Marshal,
By J. M. BAILEY, *Deputy.*

Fees, $2.00."

Endorsed: Filed in this office Nov. 4, 1898. Sam'l L. Trogdon, clerk.

Notice of Having Directed Clerk to Enter Appeal on Docket.

n the Circuit Court of the United States for the Western District of North Carolina.

'OSTAL TELEGRAPH-CABLE COM-pany *vs.* SOUTHERN RAILWAY COMPANY.	In Proceeding to Condemn Right of Way for Telegraph Purposes on Property of Southern Railway Company.

To the Postal Telegraph-Cable Company :

Take notice, that the defendant, The Southern Railway Company, has directed the clerk of the United States circuit court for the western district of North Carolina, at Greensboro, to enter upon the judgment docket, or other proper order book of said court, that, in the condemnation case of The Postal Telegraph Cable Company *vs.* Southern Railway Company, the defendant appeals from the order of the court entered on the 24th day of October, 1898, which order sustains the plaintiff's demurrer to the defendant's answer to the petition of the plaintiff, and said defendant the right to take testimony in support of its said answer, and reinstates the order of September the 15th, 1898, directing the said clerk to appoint commissioners to fix the compensation to be paid to defendant for the damages resulting from the erection of the plaintiff's telegraph line upon the defendant's right of way, and effects a substantial right claimed in the proceeding, and determines the action and settles the principles of the cause, it being intended that said appeal shall also bring up for review, so far as may be desired, any and all intermediate orders involving the merits, and necessarily affecting the said judgment and order of October 24th, 1898.

SOUTHERN RAILWAY COMPANY.
By STILES & HOLLADAY, *Its Attorneys.*

STILES & HOLLADAY, *Of Counsel.*

Service Accepted.

Endorsed.

Legal service of within notice is hereby acknowledged, and undertaking a deposit named, without, however, in any way admitting the right of appeal at the present stage of this case. I will deny and contest your right now to appeal.
This November 3, 1898.

J. R. McINTOSH,
Counsel for Telegraph Company.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

9—303

Petition for Writ of Error.

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

Petition for writ of error.

To the honorable judges of the circuit court of the United States for the western district of North Carolina:

1. Your petitioner, The Southern Railway Company, respectfully represents that it is the sole defendant in this suit, and that The Postal Telegraph-Cable Company is the sole plaintiff therein.

2. Your petitioner, conceiving itself aggrieved by the order made herein by the circuit court on the 24th day of October, 1898, particularly described in its assignment of errors hereto annexed, and also conceiving itself aggrieved by orders made by the said circuit court dated August 31, 1898, and September 15th, 1898, and by two orders of the clerk of the circuit court of the United States at Greensboro, dated, respectively, September the 19th, 1898, and October 24, 1898, does hereby appeal from said order of the circuit court dated October 24, 1898 (and all of the above-recited orders of said circuit court, and of the clerk thereof), to the United States circuit court of appeals, fourth circuit, for the reasons set out and specified in the assignment of errors filed herewith, and your petitioner prays that a writ of error may be allowed it; that a transcript of the record, proceedings and papers upon which said orders were made, duly authenticated, may be sent to the United States circuit court of appeals for the fourth circuit, and that the said orders of October 24, 1898, and all of the other aforesaid orders, may be reviewed and reversed by the said United States circuit court of appeals.

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3. And your petitioner prays for such other, further and general relief as may be proper in matters of this character. And your petitioner will ever pray, &c.

SOUTHERN RAILWAY COMPANY,
By STILES & HOLLADAY AND
F. H. BUSBEE, *Counsel.*

Endorsed: Submitted 4 November, 1898, and refused in opinion 9 November, 1898. Charles H. Simonton, circuit judge.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

Assignment of Errors.

the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE CO.
vs.
SOUTHERN RAILWAY CO.

Assignment of errors.

signment of errors filed by the Southern Railway Company, with its petition for a writ of error from an order entered in said cause October 24, 1898, and preceding orders.

And now, on this 4th day of November, 1898, came the petitioner, e Southern Railway Co., the defendant in the above-styled suit, F. H. Busbee and Stiles & Holladay, its attorneys, and says that orders entered in the said cause, to wit: the orders entered by court and dated August 31st, 1898, September 15th, 1898, and ober 24th, 1898, and the orders entered by the clerk of this court Greensboro, dated September 19th, 1898, and October 24th, 1898, erroneous and against the rights of the appellant, The Southern ilway Company; and said petitioner, The Southern Railway mpany, assigns for error and will contend in the appellate court t the court below erred as follows:

. That the order of the circuit court dated August 31, 1898, over-ing your petitioner's motion to dismiss the petitions of the plain-filed in this cause, for that said petitions did not state facts and unds sufficient to constitute a cause for action, was erroneous. e court should have sustained said motion to dismiss (called by court in said order dated August 31, 1898, a demurrer) and uld have dismissed said petitions for the reasons set out in writ-in said motion and now repeated, that is to say:

. Because the petitions of the Postal Telegraph-Cable Company , and each of them fails to set out facts and grounds constituting ause of action.

. Because the aforesaid petitions are wholly inconsistent. The tal Telegraph-Cable Co. grounds its application and cause of on in the first petition filed by it upon the statutes of North olina, supposed by it to be in force, and by its last petition unds its application upon — acts of Congress.

. Because no law exists now in force on the statute books of rth Carolina by which a telegraph company is authorized to con-m a right of way for telegraph purposes on the land of a rail-d company, or on the right of way of a railroad company.

. Because the superior court of Guilford county, North Carolina, which this suit was instituted, and from which this cause was re-ved to this honorable court, had no jurisdiction to entertain, r and determine the questions presented in this cause, and no wer or jurisdiction to condemn the land, right of way or property

of this defendant, as prayed in the said petitions, or either of them.

81 5. Because no law exists, now in force on the statute books of North Carolina, by which the plaintiff, Postal Telegraph-Cable Co., is authorized to condemn a right of way for telegraph purposes along and upon the property of the Southern Railway Co., from, to, and between the several points set out in the petitions filed in this proceeding.

6. Because the plaintiff, Postal Telegraph-Cable Co., is not authorized by law to condemn a right of way for its purposes as set out in its petitions, under, and by virtue of chapter 49 of the Code of North Carolina of 1883, and the acts of the General Assembly of said State amendatory thereof.

And because said Postal Telegraph-Cable Co. fails to allege that the property of the defendant railway Co. upon and over which it seeks to condemn a right of way for telegraph purposes, is an easement or right of way, *i. e.*, because it fails to allege that the title of the railroad company to the land or property over and upon which such telegraph right of way is sought to be condemned is held by the defendant Southern Railway Company as a right of way; and because said petitions, and each of them, fail to state facts required to give the superior court of Guilford county jurisdiction under section 2010 of the Code of North Carolina of 1883.

7. Because said Postal Telegraph-Cable Co. fails to allege that the property of the defendant railway Co. upon and over which it seeks to condemn a right of way for telegraph purposes, is an easement or right of way, *i. e.*, because it fails to allege that the title of the railroad company to the land or property, over and upon which such telegraph right of way is sought to be condemned is held by the defendant, Southern Railway Company, as a right of way, or by a title which the law knows or denominates as an easement, or right of way, as contradistinguished from a different or fee-simple title; and because said petitions, and each of them, fail to state facts required to give the superior court of Guilford county jurisdiction under section 2010 of the Code of North Carolina of 1883.

8. Because said petitions, and each of them, fail to describe the parcels of land, privilege or easement over and upon which said telegraph right of way is sought to be condemned; and because the plaintiff, Postal Telegraph-Cable Co., does not allege that it has surveyed the line or route of its proposed right of way and made a map or survey thereof by which such route or line is designated, and that they have located their said right of way for telegraph

82 purposes according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company in the clerk's office of the several counties through or into which their said telegraph lines are to be constructed.

9. Because section 2012 of the Code of North Carolina of 1883 provides as follows, viz:

"SEC. 2012. Proceedings for condemnation, appointment of commissioners, their report, exceptions thereto; appeal, final judgment,

to be as provided in this chapter in condemning, &c., for rail-
s.

The proceedings for the condemnation of lands, or any easement,
terest therein, for the use of telegraph companies, the appraisal
e lands, or interest therein, the *the* duty of the commissioners
praisal, the right of either party to file exceptions, the report
mmissioners, the mode and manner of appeal, the power and
ority of the court or judge, the final judgment, and the manner
s entry and enforcement, and the rights of the company
ling the appeal, shall be as prescribed in this chapter for con-
ning lands to the use of railroads."

nd because the Postal Telegraph-Cable Co. has wholly failed to
ply with the requirements of said section 2012 of the Code of
h Carolina in the filing of its petitions, and each of them, in
cause and the conduct of proceedings to condemn the property
e defendant.

. Because vital provisions contained in section 1944 of the Code
orth Carolina of 1883, have been repealed by an act of the Gen-
Assembly of North Carolina, ratified the 6th day of March, A. D
, which said act, together with its chapter number and title
n the following words and figures, to wit:

Chapter 396, Acts 1893.

act to amend chapter forty-nine of the Code, in relation to condemning land for right of way for railroads.

The General Assembly of North Carolina do enact:

SEC. 1. That section one thousand nine hundred and forty- of chapter forty-nine of the Code be amended by striking out aid section all from the word 'charter' in line sixteen of said on down to and including the word 'constructed' in line ty-four thereof.

SEC. 2. That (section) one thousand nine hundred and fifty-two of chapter forty-nine of the Code be repealed, and the following substituted in lieu thereof: That whenever it shall become necessary to condemn any land for the purpose of a oad that at the time that the summons for such condemnation rved, there shall also be served by the railroad company a map ving how the line of the road is located on the land sought to ondemned, and a profile showing the depth of the cuts and the hts of the embankments on the land so sought to be condemned, at what points on such land such cuts and embankments are ted.

SEC. 3. That section one thousand nine hundred and fifty-three hapter forty-nine of the Code be amended by striking out from word 'thereby' in line four down to and including the word nge' in line seven of said section.

SEC. 4. That this act shall not affect any pending litigation.

SEC. 5. That this act shall be in force from and after its ratifi-on.

Ratified the 6th day of March, A. D. 1893."

11. Because section 2012 of the Code of North Carolina of 1883, hereinbefore copied, requires that the mode and manner of ascertaining just compensation for the property or rights condemned or acquired by the condemning corporation, shall be ascertained as prescribed by said section 1946 of the Code of North Carolina of 1883, and said section 1946 has been repealed for all purposes in this particular, and on this subject by an act of the General Assembly of North Carolina, published in Public Laws of North Carolina, session of 1893, as chapter 160, which said act, together with chapter, number and title, are as follows, viz:

Chapter 160, Acts of 1891.

An act to amend section one thousand nine hundred and forty-six of the Code, in relation to the assessment of damages.

The General Assembly of North Carolina do enact:

SEC. 1. That section one thousand nine hundred and forty-six of the Code be, and the same is hereby, amended by striking out all after the word "them" in line twenty-one of said section down to and including the word "railroad" in line twenty-four: "Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs
84 of the proceeding, and shall not have a judgment for the excess of benefits over the damages."

SEC. 2. This act shall be in force from and after its ratification.

Ratified the 25th day of February, A. D. 1891.

12. And because the following provision and language contained in said section 1946 of the Code of North Carolina has been stricken out, repealed, and is no longer in force for any purpose; the words so stricken out and repealed, together with the only proviso thereto are as follows:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

The proviso is as follows:

"*Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said* land, then the *railroad company shall pay the costs of the proceedings and shall not have a judgment for the excess of benefits over the damages.*"

13. Because the said Postal Telegraph-Cable Co., failed at the time that the summons in this cause was served upon the Southern Railway Co., to also serve upon this defendant a map showing how the line or route of the right of way sought to be condem-ed on the property of the defendant is located, and the metes and bounds thereof; and because the said Postal Telegraph-Cable Co. failed to comply with the requirements of section 2 of chapter 396, Acts of 1893, of the General Assembly of North Carolina, ratified the 6th

March A. D. 1893, hereinbefore copied—in that it failed to on this defendant this map required by the said last-named or any map whatever—and because said failure is shown id by the proceedings in this cause.

ecause section 2012 of the Code of North Carolina of 1883 s that all proceedings for the condemnation of land, or any it therein, for the use of telegraph companies shall be as ed in chapter 49 of the Code of North Carolina of 1883 for ning lands to the use of railroads; and because sections 944, 1946, and 1952 of said chapter 49 have been amended nd changed in vital particulars and repealed for all purposes so far as they applied to this defendant, Southern y Company.

he defendant, Southern Railway Co., moves to dismiss the titions and each of them in this proceeding, because the Telegraph-Cable Co. fails to set out clearly and accurately it of way which it seeks to condemn, its location and the nd bounds thereof, and all the purposes for which it desires ne proposed right of way sought to be condemned.

ecause the laws of North Carolina do not and never have olated an indefinite, uncertain, changing and wobbling right such as is described in the aforesaid petitions and each of

d. The appellant, The Southern Railway Company, further and will contend in the appellate court that the order of t herein dated September 15, 1898, was erroneous and should rsed for the sixteen reasons above assigned as error comby the circuit court in its order overruling your petitioner's to dismiss the plaintiff's petition because they failed to state d grounds constituting a cause of action, and also because der of September 15, 1898, was prematurely entered and notice to your petitioner, and because neither said order of er 15, 1898, nor the powers, duties, and proceedings of the sioners, thereby directed to be appointed, as set out in said ere authorized by law and also because the court, in the said order, erred in directing its clerk to appoint commisto assess damages as therein set out, and erred in prescribing to be taken by said commissioners and in directing the procedure and the principles and rules by which said sioners should be governed, and erred in fixing the place essions of said commissioners and how they shall be per, and the elements to be considered by them and the form stance of their report.

. The appellant, The Southern Railway Company, further and will insist in the appellate court that the order herein mber 19, 1898, made by Samuel L. Trogdon, clerk of this as erroneous and should be revised, because the said clerk awful authority to make said order, and because said order neous for the same reasons above set out in respect to the foresaid order of September 15, 1898.

86 Fourth. The appellant, The Southern Railway Company, submits, and will insist in the appellate court, that the order of the circuit court herein of October 24, 1898, sustaining the plaintiff's demurrer to defendant's answer, refusing to allow your petitioner to introduce evidence in support of the allegations of its answer and otherwise ordering as therein ordered, was erroneous and should be reversed for all of the reasons above assigned for reversing the orders of the court dated August 31, 1898, and September 15, 1898, and further, because the court by said order of October 24, 1898, erred in not holding that your petitioner's answer set up a complete defense. The court should have held that each of the grounds of defense set up in said answer (which said grounds are prayed to be treated and considered as if here again inserted at full length), constituted a full and complete defense to the plaintiff's petitions and required their dismissal by the court; and that the court also erred in refusing to allow your petitioner to introduce testimony in the support of the allegations of the said answer, and for the reasons aforesaid, erred in reinstating the aforesaid order of September 15, 1898, and in directing the clerk of the court to fix a day for the meeting of the commissioners appointed by him.

Fifth. The appellant will also submit and insist in the appellate court that the order made by Samuel L. Trogdon, clerk of this court, dated October 24, 1898, was erroneous, and should be reversed for the reasons above assigned as to his order of September 19, 1898.

Sixth. For these and other reasons appearing upon the face of the orders above described and proceedings in this cause, your petitioner prays for a writ of error to said order of the court dated October 24, 1898 (and also to each of the above orders), and for a supersedeas to said order of said circuit court dated October 24, 1898.

SOUTHERN RAILWAY COMPANY,
By STILES AND HOLLADAY AND
F. H. BUSBEE, *Counsel.*

Submitted with petition.

C. H. S.

Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

87 *Opinion Refusing an Appeal.*

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court, Fourth Circuit. At Law.

THE POSTAL CABLE-TELEGRAPH COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

The petition for condemnation being before the court with an answer thereto, the petitioner interposed a demurrer to the answer.

rrer went to the merits and was not formal. After argu-demurrer was sustained. Thereupon, pursuing the pro-he statute of North Carolina, an order was entered looking ointment of commissioners. At this stage the defendant tition for leave to appeal, accompanied by exceptions and ts of error. The question is, Is this judgment on the de-inal judgment?

nent or decree to be final for the purpose of review must litigation on the merits so that on affirmance by this court below would have nothing to do but to execute the or decree already rendered. Bostwick *vs.* Brinckerhoff, 3.

ing this rule, we find in Life and Fire Ins. Co. of N. Y. 9 Pet., 571, though the merits of the cause have been lly decided while anything, though formal, remains to be court cannot pass on the subject. So, also, in Lata *vs.* 150 U. S., 524, a decree which refers a case to a master to ccount between the parties, upon which a further decree tered, is not final.

ington, &c., *vs.* Simmons, 123 U. S., 52, a decree establish-ght of a junior mortgagee to redeem from a prior mort-not determining the amount he must pay, or the amount e mortgage, is interlocutory.

Palmira, 10 Wheaton, 502, a decree for restitution, with damages, was held not to be final, as the damages were scertained.

e *vs.* Vasques, 11 Wheaton, 429, where a decree for dam-llowed on a libel, and commissioners were appointed to he amount of damages, it was held that no appeal would ie commissioners reported, for it was not a final decree.

tter seems to be settled by Luxton *vs.* North River Bridge 147 U. S., 341. That was a case of condemnation of land. ame up on a writ of error, seeking to reverse an order ointing commissioners on petition for that purpose. The : "The case throughout, from the application of the cor-or the appointment of commissioners to assess damages to of the land proposed to be taken, until judgment upon of the commissioners, or upon the verdict of a jury asses-ing ages, remains in the circuit court of the United States and upervision and control. The action of that court in this other cases on the common-law side, is not reviewable by by certiorari, but only by writ of error, which does not fter final judgment disposing of the whole case and ad-all the rights, whether of title or damages, involved in on. The case is not to be sent up in fragments by suc-ts of error.

uthorities lead to the conclusion that there is no final in this case. The petition for writ of error is refused.

CHARLES H. SIMONTON,
Circuit Judge.

ıber, 1898.
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Endorsed: Filed in this office November 14, 1898. Sam'l L. Trogdon, clerk.

Order Refusing an Appeal.

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

Upon the entry by the court of the order herein of October 24, 1898, sustaining the plaintiff's demurrer to the defendant's answer, and otherwise ordering as therein ordered, the defendant then and there gave notice in open court of its purpose to appeal, and wrote out and delivered in open court to the counsel for the plaintiff a paper containing, amongst other things, a proper statement and assignments of error alleged and grounds of appeal from the orders of the court herein, dated August 31, 1898, September 15, 1898, and October 24, 1898, respectively, and the order of the clerk of this court, at Greensboro, dated September 19, 1898, which paper
89 was made an order of court and part of the record, and then the defendant moved the court to allow it a writ of error to the aforesaid order of October 24, 1898, and previous orders, and thereupon, on the motion of the plaintiff, the court continued said application of the defendant for a writ of error until the 4 day of November, 1898, and fixed that day for a hearing on said application.

And, the defendant, having been given twenty days from October 24, 1898, to prepare its bills of exception, on this 3 day of November, 1898, came the defendant and tendered to the court its three bills of exception, which were signed and sealed and made a part of the record.

And the defendant also tendered to the court a formal petition for a writ of error, together with an assignment of errors, and prayed the court to grant such writ of error. The prayer of which petition has been refused—the petition having been presented on 4 November, 1898, and refused 9 November, 1898.

CHARLES H. SIMONTON,
Circuit Judge.

Endorsed: Filed in this office Nov. 14, 1898. Sam'l L. Trogdon clerk.

Order Reinstating Order of September 15, 1898.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In Circuit Court. At Law.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

This cause coming on for hearing before the judge at chambers, in the city of Richmond, Va., on the 7th day November, 1898, the hearing having been adjourned from November 4, 1898, upon the petition of the defendant railway company, for writ of error to the circuit court of appeals, from an order made at chambers in Charleston, S. C., on the 24th day of October, 1898, sustaining the demurrer of plaintiff telegraph company, to the answer of defendant railway company, and reinstating an order made September 15th, 1898, for the appointment of commissioners to assess the damages to which the railway company is entitled for the use of so much of the right of way of defendant railway company as prayed for in the original petition of said plaintiff.

90 And after argument by counsel for the plaintiff and defendant, and the court being of opinion that said order from which defendant petitions for appeal is not a final order from which an appeal lies, it is, therefore, ordered, adjudged, and decreed that the said petition for writ of error be, and the same is hereby, denied. And it is further ordered that said order for the appointment of commissioners be, and the same *it* hereby reinstated, and the clerk of this court at Greensboro, North Carolina, Sam'l L. Trogdon, Esq., is hereby authorized and directed to give notice to the commissioners heretofore appointed by him, and the defendant railway company, to assemble in the U. S. court-room at Greensboro, North Carolina, at a time not less than ten days from said notice, to assess the damages to which the said railway company is entitled from the said plaintiff telegraph company, as authorized and decreed in said first order directing the appointment of said commissioners.

CHARLES H. SIMONTON,
Circuit Judge.

9 November, 1898.

Notice that Defendant Excepts.

On the signing of this order, defendant gives notice that it excepts.

CHARLES H. SIMONTON.

Endorsed: Filed in this office Nov. 14th, 1898. Sam'l L. Trogdon, clerk.

Notice to Commissioners to Meet November 28th, 1898.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court, Fourth Circuit, at Greensboro.

POSTAL TELEGRAPH-CABLE COMPANY *vs.* THE SOUTHERN RAILWAY COMPANY. } Notice to Commissioners to Meet on November 28th, 1898.

To A. M. Scales, J. M. Walker, and James A. Hodgin, commissioners in the above-entitled case:

In pursuance of an order made by his honor, Charles H. 91 Simonton, dated November 9th, 1898, and other decrees and orders theretofore made: You are hereby summoned and directed to appear and be in the court-room in the U. S. building at Greensboro, N. C., on November 28th, 1898, at 10 o'clock a. m., at which time and place a hearing will be had by you for the purposes expressed in the order of his honor, Charles H. Simonton, authorizing your appointment, and in the notice heretofore served on you.

Witness my hand and seal of this court November 14th, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

Marshal's Return.

"Received November 15, '98. Executed Nov. 15, '98, by reading and delivering a copy of this notice to each of the commissioners, A. M. Scales, J. M. Walker and Jas. A. Hodgin.

J. M. MILLIKAN,
U. S. Marshal,
By J. M. BALEY,
Deputy Marshal."

Endorsed: Filed in this office Nov. 15, 1898. Sam'l L. Trogdon, clerk.

Notice of Hearing by Comm'rs Nov. 28, 1898.

UNITED STATES OF AMERICA,
Western District of No. Ca.

In the Circuit Court, Fourth Circuit.

POSTAL TELEGRAPH CABLE COMPANY *vs.* THE SOUTHERN RAILWAY COMPANY. } Notice of Hearing by Commissioners in Condemnation Proceedings.

To the above-named parties and their attorneys:

You will take notice that the hearing by the commissioners appointed in this cause, for the purposes expressed in the order of his honor, Charles H. Simonton, and in the notice heretofore given you, which hearing was stayed by a further order of his honor, Charles

H. Simonton, will now proceed under an order dated Nov. 9th, 1898, and that said hearing will be had in the court-room in the U. S. building in Greensboro, N. C., on Monday, November 28th, 1898, at 10 o'clock a. m., of which hearing you will take notice.

Witness my hand and seal of this court November 14th, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

92 *Marshal's Return.*

Received Nov. 15, '98. Executed Nov. 15, '98. By reading and delivering a copy of this notice to W. E. Coffin, agent of So. R'y Co., at Greensboro, N. C.

J. M. MILLIKAN,
U. S. Marshal,
By J. M. BALEY,
Office D. M.

I hereby except service on within notice. Nov. 14th, 1898.

L. A. BROOKS,
Att'y for Pl'tff.

Endorsed: Filed in this office Nov. 14, 1898. Sam'l L. Trogdon, clerk.

Oath of A. M. Scales, Comm'r.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

In the Circuit Court, Fourth Circuit, at Greensboro.

THE POSTAL TELEGRAPH-CABLE COMPANY }
vs. }
THE SOUTHERN RAILWAY COMPANY. }

I, A. M. Scales, a commissioner duly appointed in the above-entitled cause, do solemnly swear that I will fairly and impartially appraise the value of the easement mentioned in the petition in this cause, and a true report make of the amount of damages to be sustained by the Southern railway by reason of the granting the petition of the Postal Telegraph-Cable Company, to the best of my skill and ability. So help me God.

A. M. SCALES.

Subscribed and sworn to before me this the 28th day of November, 1898.

SAM'L L. TROGDON, *Clerk.*

Endorsed: Filed in this office Nov. 28th, 1898. Sam'l L. Trogdon, clerk.

93 *Oath of J. M. Walker, Comm'r.*

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court, Fourth Circuit, at Greensboro.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

I, J. M. Walker, a commissioner duly appointed in the above-entitled cause, do solemnly swear that I will fairly and impartially appraise the value of the easement mentioned in the petition in this cause, and a true report make of the amount of damages to be sustained by the Southern railway by reason of the granting the petition of the Postal Telegraph-Cable Company, to the best of my skill and ability. So help me God.

J. M. WALKER.

Subscribed and sworn to before me this the 28th day of Nov'r, 1898.

—— ——.

Endorsed: Filed in this office Nov. 28, 1898. Sam'l L. Trogdon, clerk.

Affirmation of J. A. Hodgin, Comm'r.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the Circuit Court, Fourth Circuit, at Greensboro.

THE POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

I, J. Addison Hodgin, a commissioner duly appointed in the above-entitled cause, do solemnly affirm that I will fairly and impartially appraise the value of the easement mentioned in the petition in this cause, and a true report make of the amount of damages to be sustained by the Southern railway by reason of the granting the petition of the Postal Telegraph-Cable Company, to the best of my skill and ability, and this — my solemn affirmation.

J. ADDISON HODGIN.

Subscribed and affirmed to before me this the 28th day of Nov., 1898.

SAM'L L. TROGDON, *Clerk.*

94 Endorsed: Filed in this office Nov. 28, 1898. Sam'l L. Trogdon, clerk.

Report of Commissioners.

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
THE SOUTHERN RAILWAY COMPANY.

To the honorable the judges of the circuit court of the United States, fourth circuit:

Pursuant to a summons issued on the 19th day of September, 1898, by S. L. Trogdon, clerk of U. S. circuit court, at Greensboro, North Carolina, notifying us of our appointment as commissioners in the above-entitled action to assess the damage of the said Southern Railway Company, which may accrue to the said company by reason of the construction of a line of telegraph along its right of way by the plaintiff, The Postal Telegraph-Cable Company, and in pursuance of a further summons issued by the said S. L. Trogdon, clerk as aforesaid, on the 14th day of November, 1898, directing us to appear and be in the court-room in the U. S. building at Greensboro, N. C., on the 28th day of November, 1898, at 10 o'clock, a. m., for the purpose of assessing the damage as aforesaid, we, your commissioners, meet at the time and place aforesaid, as directed, with S. L. Trogdon, clerk as aforesaid, presiding.

Whereupon the following proceedings are had, to wit:

The plaintiff, The Postal Telegraph-Cable Company is present by attorney, A. L. Brooks, Esq., the defendant not being present in person or by attorney, A. L. Brooks, Esq., attorney as aforesaid, produces a paper signed by F. H. Busbee, Esq., attorney for defendant agreeing to a continuance of the hearing of said matter to Wednesday, November 30th, 1898, at 10 o'clock, a. m., which said paper is hereto attached and marked Exhibit A.

Whereupon, upon motion of A. L. Brooks, Esq., attorney as aforesaid, the commission takes a recess until the 30th day of November, 1898, at 10 o'clock, a. m.

GREENSBORO, N. C., *November* 30, 1898.

Pursuant to adjournment, the commission meets at the place specified in the summons as aforesaid on the 30th day of November, 1898, at 10 o'clock, a. m., with S. L. Trogdon, clerk as aforesaid presiding—whereupon the following proceedings are had, to wit:

The plaintiff is present by A. L. Brooks, Esq., attorney, the defendant not being present in person or by attorney. It appearing to the commissioners that an appeal has been granted by your honorable court to the defendant and that all proceedings by the commissioners are stayed until further orders of the court, and upon motion of A. L. Brooks, attorney as aforesaid, the commissioners

adjourn subject to the order of the court, to meet upon motion given by S. L. Trogdon, clerk as aforesaid.

Your commissioners would respectfully recommend that the court allow $2.50 each to Misses Georgia Simpson and Emily Austin, stenographers and typewriters, employed by the commission to take evidence in the said case, and who are in attendance at the meeting today.

Respectfully submitted as our report of the proceedings to this date.

Witness our hands this the 30th day of November, 1898.

ALFRED M. SCALES,
Commissioner.
J. M. WALKER,
Commissioner.
J. ADDISON HODGIN,
Commissioner.

EXHIBIT A.

We shall not interpose any objection to the Postal Telegraph-Cable case going over from Monday until Wednesday, Dec. 1.

SO. RY CO.,
By F. H. BUSBEE.

Nov. 26th, 1898.

Endorsed: Filed in this office Nov. 30th, 1898. Sam'l L. Trogdon, clerk.

Order Setting Aside Order Made November 9th, 1898, and Granting Writ of Error.

In the Circuit Court of the United States for the Western District of North Carolina.

POSTAL TELEGRAPH-CABLE COMPANY
vs.
SOUTHERN RAILWAY COMPANY.

It is ordered that the order made herein on the 9th day of
96 November, 1898, refusing to allow the defendant a writ of error and supersedeas, as prayed in its petition and assignment of errors filed in this cause on the 4th day of November, 1898, be and the same is hereby set aside, and the writ of error and supersedeas, prayed in said petition and assignment of errors are hereby granted, provided the defendant within the next ten days files in the papers of this cause bond in the penalty of one thousand dollars as provided by law, with surety to be approved by one of the judges of this court.

NATHAN GOFF,
U. S. Circuit Judge.

November 29, 1898.

Endorsed: Filed in this office Dec. 1st, 1898. Sam'l L. Trogdon, clerk.

Stipulations of Counsel.

he Circuit Court of the United States for the Western District of North Carolina.

ostal Telegraph-Cable Company
vs.
Southern Railway Company. } Stipulations of Counsel.

er containing 16 grounds of motion to dismiss referred to and described in defendant's bill of exceptions No. 1.

he defendant, The Southern Railway Company, hereby expressly rving to itself the right further to except to the petition- of the ntiff filed herein, and each of them, for that the same do not facts and grounds sufficient to constitute a cause of action, asks e to state specifically some of its grounds of objection to said ions, and each of them, preliminary to its answer.

he defendant, Southern Railway Co., moves to dismiss the said ions, and each of them, filed by the Postal Telegraph-Cable Co., is proceeding, for the reasons hereafter stated, and on the fol- ng grounds, viz: (Here insert the 16 grounds or reasons set out riting in the assignment of errors, in support of the first of said uments.)

Because the petitions of the Postal Telegraph-Cable Company and each of them fails to set out facts and grounds constituting se of action.

2. Because the aforesaid petitions are wholly inconsistent. The Postal Telegraph-Cable Co. grounds its application and cause of action in the first petition filed by it upon the stat- of North Carolina, supposed by it to be in force, and by its petition grounds its application upon — acts of Congress.

Because no law exists now in force on the statute books of h Carolina by which a telegraph company is authorized to emn a right of way for telegraph purposes on the land of a oad company, or on the right of way of a railroad company.

Because the superior court of Guilford county, North Carolina, hich this suit was instituted, and from which this cause was oved to this honorable court, had no jurisdiction to entertain, and determine the questions presented in this cause, and no r or jurisdiction to condemn the land, right of way or property is defendant, as prayed in the said petitions, or either of them.

Because no law exists, now in force on the statute books of h Carolina, by which the plaintiff, Postal Telegraph-Cable Co., thorized to condemn a right of way for telegraph purposes g and upon the property of the Southern Railway Co., from, to, between the several points set out in the petitions filed in this eding.

Because the plaintiff, Postal Telegraph-Cable Co., is not author- by law to condemn a right of way for its purposes as set out in titions, under, and by virtue of chapter 49 of the Code of North

Carolina of 1883, and the acts of the General Assembly of said State amendatory thereof.

And because said Postal Telegraph-Cable Co. fails to allege that the property of the defendant railway Co. upon and over which it seeks to condemn a right of way for telegraph purposes, is an easement or right of way, *i. e.*, because it fails to allege that the title of the railroad company to the land or property over and upon which such telegraph right of way is sought to be condemned is held by the defendant, Southern Railway Company, as a right of way; and because said petitions, and each of them, fail to state facts required to give the superior court of Guilford county jurisdiction under section 2010 of the Code of North Carolina of 1883.

7. Because said Postal Telegraph Cable Co. fails to allege that the property of the defendant railway Co. upon and over which
98 it seeks to condemn a right of way for telegraph purposes, is an easement or right of way, *i. e.*, because it fails to allege that the title of the railroad company to the land or property over and upon which such telegraph right of way is sought to be condemned is held by the defendant, Southern Railway Company, as a right of way, or by a title which the law knows or denominates as an easement, or a right of way, as contradistinguished from a different or fee-simple title; and because said petitions, and each of them, fail to state facts required to give the superior court of Guilford county jurisdiction under section 2010 of the Code of North Carolina of 1883.

8. Because said petitions, and each of them, fail to describe the parcels of land, privilege or easement over and upon which said telegraph right of way is sought to be condemned; and because the plaintiff, Postal Telegraph Cable Co., does not allege that it has surveyed the line or route of its proposed right of way and made a map or survey thereof by which such route or line is designated, and that they have located their said right of way for telegraph purposes according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company in the clerk's office of the several counties through or into which their said telegraph lines are to be constructed.

9. Because section 2012 of the Code of North Carolina of 1883 provides as follows, viz:

"SEC. 2012. Proceedings for condemnation, appointment of commissioners, their report, exceptions thereto; appeal, final judgment, &c., to be as provided in this chapter in condemning, &c., for railroads.

"The proceedings for the condemnation of lands, or any easement, or interest therein, for the use of telegraph companies, the appraisal of the lands, or interest therein, the *the* duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in this chapter for condemning lands to the use of railroads."

because the Postal Telegraph-Cable Co. has wholly failed to
r with the requirements of said section 2012 of the Code of
Carolina in the filing of its petitions, and each of them, in
use, and the conduct of proceedings to condemn the property
of the defendant.

10. Because vital provisions contained in section 1944 of
the Code of North Carolina of 1883, have been repealed by
of the General Assembly of North Carolina, ratified the 6th
March, A. D. 1893, which said act, together with its chapter
er and title, are in the following words and figures, to wit:
insert act ratified March 6, 1893, "Exhibit A" at the foot of
aper.)

"EXHIBIT A."

Chapter 396, Acts 1893.

et to amend chapter forty-nine of the Code, in relation to condemning land for right of way for railroads.

e General Assembly of North Carolina do enact:

c. 1. That section one thousand nine hundred and forty-four
pter forty-nine of the Code be amended by striking out in
ection all from the word 'charter' in line sixteen of said sec-
own to and including the word 'constructed' in line twenty-
ereof.

c. 2. That (section) one thousand nine hundred and fifty-two
ter forty-nine of the Code be repealed, and the following sub-
l in lieu thereof: That whenever it shall become necessary
demn any land for the purposes of a railroad that at the time
e summons for such condemnation is served, there shall also
ed by the railroad company a map showing how the line of
d is located on the land sought to be condemned, and a pro-
wing the depth of the cuts and the heights of the embank-
on the land so sought to be condemned, and at what points
land such cuts and embankments are located.

c. 3. That section one thousand nine hundred and fifty-three
ter forty-nine of the Code be amended by striking out from
rd 'thereby' in line four down to and including the word
e' in line seven of said section.

c. 4. That this act shall not affect any pending litigation.

c. 5. That this act shall be in force from and after its ratifica-

tified the 6th day of March, A. D. 1893."

Because section 2012 of the Code of North Carolina of 1883,
before copied, requires that the mode and manner of ascer-
taining just compensation for the property or rights con-
demned or acquired by the condemning corporation, shall
be ascertained as prescribed by said section 1946 of the Code
th Carolina of 1883, and said section 1946 has been repealed
purposes in this particular, and on this subject by an act of
neral Assembly of North Carolina, published in Public Laws

of North Carolina, session of 1893, as chapter 160, which said act, together with chapter, number and title, are as follows, viz: (Here insert the said chapter 160, "Exhibit B" at the foot of this paper.)

"EXHIBIT B."

Chapter 160, Acts of 1891.

An act to amend section one thousand nine hundred and forty-six of the Code, in relation to the assessment of damages.

The General Assembly of North Carolina do enact:

SEC. 1. That section one thousand nine hundred and forty-six of the Code be, and the same is hereby, amended by striking out all after the word "them" in line twenty-one of said section down to and including the word "railroad" in line twenty-four: "Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs of the proceeding, and shall not have a judgment for the excess of benefits over the damages."

SEC. 2. This act shall be in force from and after its ratification.

Ratified the 25th day of February, A. D. 1891.

12. And because the following provision and language contained in said section 1946 of the Code of North Carolina has been stricken out, repealed, and is no longer in force for any purpose; the words so stricken out and repealed, together with the only proviso thereto are as follows:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

The proviso is as follows:

"*Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to*
101 *said land, then the* said land then the *railroad company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damages.*"

13. Because the said Postal Telegraph-Cable Co., failed at the time that the summons in this cause was served upon the Southern Railway Co. to also serve upon this defendant a map showing how the line or route of the right of way sought to be condemned on the property of the defendant is located, and the metes and bounds thereof; and because the said Postal Telegraph-Cable Co. failed to comply with the requirements of section 2 of chapter 396, Acts of 1893, of the General Assembly of North Carolina, ratified the 6th day of March A. D. 1893, hereinbefore copied—in that it failed to serve upon this defendant this map required by the said last-named statute, or any map whatever—and because said failure is shown upon and by the proceedings in this cause.

14. Because section 2012 of the Code of North Carolina of 1883

that all proceedings for the condemnation of land, or any
t therein, for the use of telegraph companies shall be as
d in chapter 49 of the Code of North Carolina of 1883 for
ing lands to the use of railroads; and because sections
46, and 1952 of said chapter 49 have been amended and
in vital particulars and repealed for all purposes so far as
plied to this defendant, Southern Railway Company.
he defendant, Southern Railway Co. moves to dismiss the
itions and each of them in this proceeding, because the
Telegraph Cable Co. fails to set out clearly and accurately
t of way which it seeks to condemn, its location and the
d bounds thereof, and all the purposes for which it desires
e proposed right of way sought to be condemned.
ecause the laws of North Carolina do not and never have
lated an indefinite, uncertain, changing and wobbling right
uch as is described in the aforesaid petitions and each of

der to complete the record and at the same time to avoid the
sary enlargement of it, it is hereby stipulated and agreed,
above paper, as filled out and completed by the reference
made, is identical with and shall substitute the paper re-
rred to and described in defendant's first bill of exceptions
s "paper containing 16 grounds of motion to dismiss,"
hich paper has been misplaced and lost.
rther stipulated and agreed that all the affidavits filed at
e upon the 12 day of July, 1898, or thereabouts, upon the
t of the two motions to perpetuate the injunction in the
use and remand the proceeding to the State court, shall be
part of the record.

J. R. McINTOSH,
Counsel for Postal Telegraph-Cable Co.
STILES & HOLLADAY,
For Southern Railway Co.

sed: Filed in this office Dec. 2, 1898. Sam'l L. Trogdon,

Appeal Bond.

all men by these presents, that we, Southern Railway
y, as principal, and the Fidelity and Deposit Company of
d, having an office at No. 35 Wall street, New York city,
es, are held and firmly bound unto the Postal Telegraph-
mpany, in the full and just sum of one thousand dollars,
d to the said Postal Telegraph-Cable Company, its certain
, executor, administrators, or assigns; to which payment,
truly to be made, we bind ourselves, our heirs, executors,
inistrators, jointly and severally, by these presents.
with our seals, and dated this first day of December, in the
ur Lord, one thousand eight hundred and ninety-eight.
as, lately at a circuit court of the United States for the
district of North Carolina, in a suit depending in said court

between The Postal Telegraph-Cable Company, complainant, and The Southern Railway Company, defendant, a judgment was rendered against the said Southern Railway Company, and the said Southern Railway Company having obtained a writ of error and supersedeas, and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Postal Telegraph-Cable Company, citing and admonishing it to be an- appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond, on the thirtieth day of December, 1898.

103 Now, the condition of the above obligation is such, that if the said Southern Railway Company shall prosecute said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

SOUTHERN RAILWAY COMPANY, [SEAL.]
By SAMUEL SPENCER, *President.* [SEAL.]

Attest: JOSIAH F. HILL, *Secretary.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
By HUGH M. ALLWOOD, *Attorney-in-fact.*

Attest: JOHN W. WOOTEN, *Attorney.*

Sealed and delivered in presence of—

—— ——.

[5-cent revenue stamp attached.]

COUNTY AND STATE OF NEW YORK, *ss:*

On the 1st day of December, in the year 1898, before me personally came Hugh M. Allwood, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he was the attorney-in-fact of the Fidelity and Deposit Company of Maryland, the corporation named in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order. And the said Hugh M. Allwood further said that he was acquainted with John W. Wooten, and knew him to be the attorney of said company; that the signature of the said John W. Wooten subscribed to the said instrument was in the genuine handwriting of the said John W. Wooten, and was thereto subscribed by the like order of the said board of directors, and in the presence of him, the said Hugh M. Allwood.

[SEAL.] J. WHITMORE BARRY,
Notary Public, New York County.

ar meeting of the board of directors of the Fidelity and
it Company of Maryland, held in the office of the com-
in the city of Baltimore, State of Maryland, on the first
f June, 1898, at which was present a quorum of said
ly authorized to act in the premises, on motion, it was
—

l, That in pursuance of section eight hundred and eleven
of Civil Procedure of the State of New York, Henry B.
resident, or John W. Wooten, attorney, or Frank H.
dore F. Wood, Edward T. Platt, Joseph A. Flynn
M. Allwood, attorneys-in-fact of this company in
New York, be, and each of them is, hereby authorized
red to sign, execute and deliver any and all bonds or
s for or on behalf of this company, and to attach thereto
he corporation, the same to be attested by the said John
attorney of the company, or by either one of the other
ve named, as occasion may require."

STATE OF NEW YORK, *ss.:*

V. Wooten, attorney for the Fidelity and Deposit Com-
yland, have compared the foregoing resolution with the
reof, as recorded in the minute book of said company,
by certify that the same is a true and correct transcript
nd of the whole of the said original resolution.
der my hand and seal of the company, at the city of
his 1st day of Dec., 1898.

JOHN W. WOOTEN, *Attorney.*

Fidelity and Deposit Company of Maryland.

Statement, December 31st, 1897.

Resources.

.....	$600,000 00
bonds.....	1,610,800 00
due by agents, less commission.....	101,136 77
k, etc.....	188,587 56
	$2,500,524 33

Liabilities.

s.....	$1,000,000 00
.....	1,000,000 00
.....	435,089 69
rocess of adjustment.....	7,829 78
ted, proof not filed.....	20,507 71
profits.....	37,097 15
	$2,500,524 33

105 COUNTY AND STATE OF NEW YORK, *ss.:*

John W. Wooten, being duly sworn, says that he is the attorney of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of December 31st, 1897, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JOHN W. WOOTEN.

Subscribed and sworn to before me this 1st day of Dec., 1898.

[SEAL.] J. WHITMORE BARRY,
Notary Public, New York County.

Statement of the Financial Condition of the Fidelity and Deposit Company of Maryland at the Close of Business September 30, 1898.

RESOURCES.

Par value.		Market value.
	Real estate (Fidelity building).....	$600,000 00
$501,800,	Baltimore city stock, 3½ per cent. 1928, 1930, 1940, 1945.....	529,820 00
48,000,	Do. Do. 6 per cent. 1900.....	49,440 00
200,000,	New York city gold export dock bonds....	218,000 00
100,000,	State of Maryland insane asylum bonds, 3½ per cent. loan	105,000 00
125,000,	State of Georgia, 4½ per cent. bonds, 1911, 1912, 1916.....	139,750 00
30,000,	State of Tennessee, 3 per cent. bonds.....	26,400 00
50,000,	City of Buffalo, N. Y., 3½ per cent. bonds..	51,500 00
25,000,	City of Westminster, Md., 4½ per cent. bonds.	25,000 00
39,500,	City of Frederick, Md., 4 per cent. bonds...	41,110 00
25,000,	City of Petersburg, Va., 5 per cent. bonds...	26,500 00
25,000,	City of Richmond, Va., 4 per cent. bonds...	25,000 00
10,500,	City of Rockville, Md., 4 per cent. bonds...	10,500 00
30,000,	Lucas county, Ohio, court-house, 4 per cent. bds.....	30,000 00
106		
100,000,	Baltimore Traction Co. bonds, (N. B. division) 1st 5's.....	115,000 00
48,000,	City & Suburban Railway Co. of Baltimore, bonds, 1st 5's.....	54,240 00
41,000,	Virginia Midland R. R. Co., 6 per cent. bonds.	47,420 00
25,000,	Charlotte, Columbia & Augusta R. R. Co., 5 per cent. bonds.....	26,750 00
10,000,	Petersburg R. R. Co., class "B" 6 per cent. bonds.....	11,400 00
11,000,	Georgia Pacific R. R. Co., 6 per cent. bonds.	12,980 00
30,000,	Raleigh & Gaston R. R. Co., 5 per cent. bonds.....	30,000 00

50,000.	Wilmington & Weldon R. R. Co., 5 per cent. bonds	58,000 00
50,000.	Ohio & Mississippi R. R. ext. 4's	52,500 00
	Agents' debit balances, less commissions	128,728 87
	Premiums in course of collection (home office)	8,590 48
	Cash in office and banks	179,697 79
		$2,603,227 14

LIABILITIES.

Capital stock (paid in)	$1,000,000 00
Surplus	1,000,000 00
Premium reserve requirement	510,045 61
Claims adjusted (checks out)	1,862 09
Claims in process of adjustment	16,160 94
Claims reported, but proof not filed, etc	14,104 38
Undivided profits	61,154 12
	$2,603,327 14

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I, Herman E. Bosler, treasurer of the Fidelity and Deposit Company of Maryland, do hereby certify that the aforegoing is a true statement of the assets and liabilities of said company as of September 30th, 1898, taken from the books and records of said company.

In testimony whereof, I hereunto subscribe my name and affix the seal of said company this 30th day of November, A. D. 1898.

H. E. BOSLER, *Treasurer.*

107 STATE OF MARYLAND, *City of Baltimore,* } *ss:*

On this 30th day of November, A. D. 1898, before the subscriber, a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified, came Herman E. Bosler, treasurer of the Fidelity and Deposit Company of Maryland, to me personally known, and being by me duly sworn, deposeth and saith that he is the said officer of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company; and that the foregoing is a true statement of the assets and liabilities of said company at the close of business September 30th, 1898, taken from the books and records of said company; and that said company has not since said 30th day of September, 1898, sustained any losses affecting its financial condition.

In testimony whereof I have hereunto set my hand and affixed my official seal at the city of Baltimore this 30th day of November, 1898.

[SEAL.]

FRED. S. AXTELL,
Notary Public.

Whereas, the Fidelity and Deposit Co. of Maryland, a corporation duly incorporated under the laws of the State of Maryland, has appointed an agent as required by section 2 of the act of August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has deposited with me its charter or articles of incorporation and the statement required by section 3 of said act; and has satisfied me that it has authority under said charter to do the business provided for in said act, that it has a paid-up capital of not less than $250,000.00 in cash or its equivalent, and that — is able to keep and perform its contract.

Now, therefore, the requirements of said act preliminary to the transaction of business thereunder in the above, and all other particulars, having been fully complied with, the said Fidelity and Deposit Co. of Maryland is hereby granted authority to do business under said act.

[SEAL.] RICHARD OLNEY,
Attorney General.

Department of Justice, Washington, D. C., August 28, 1894.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *July* 21, 1898.

108 The annexed is a true copy of an original authorization to do business, issued by the Attorney General under the act of Congress approved August 13, 1894.

Witness my hand and the seal of the department.

[SEAL.] C. B. SORNBERGER,
Acting Chief Clerk.

Endorsed: Bond approved. Nathan Goff, U. S. circuit judge, fourth circuit.

Endorsed: Filed in this office Dec. 7, 1898. Sam'l L. Trogdon, clerk.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Postal Telegraph-Cable Company, plaintiff, and The Southern Railway Company, defendant, a manifest error hath happened, to the great damage of the said Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal,

ctly and openly, you send the record and proceedings afore-
with all things concerning the same, to the United States cir-
ourt of appeals for the fourth circuit, together with this writ,
ai you have the same at Richmond, on the thirtieth day of
nber, 1898, in the said circuit court of appeals, to be then and
held, that the record and proceedings aforesaid being inspected,
the said circuit court of appeals may cause further to be done
therein to correct that error, what of right and according to
the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller,
of the Court. Chief Justice of our Supreme Court, the third day of December, in the year of our Lord one thousand eight hundred and ni*h*ety-eight.

HENRY T. MELONEY,
Clerk of the U. S. Circuit Court of Appeals,
Fourth Circuit.

lowed by—
NATHAN GOFF,
U. S. Circuit Judge.

ed in this office Dec. 7, 1898.
SAM'L L. TROGDON, *Clerk.*

Citation.

ED STATES OF AMERICA, *ss:*

President of the United States to the Postal Telegraph-Cable
mpany, Greeting:

ou are hereby cited and admonished to be and appear at a
ed States circuit court of appeals for the fourth circuit, to be
en at Richmond on the thirtieth day of December, 1898, pur-
t to a writ of error filed in the clerk's office of the circuit court
e United States for the western district of North Carolina,
rein The Southern Railway Company is plaintiff in error and
are defendant in error, to show cause, if any there be, why
udgment rendered against the said plaintiff in error, as in the
writ of error mentioned, should not be corrected, and why
dy justice should not be done to the parties in that behalf.
itness the Honorable Nathan Goff, one of the judges of the said
it court of the United States, this thirtieth day of November,
e year of our Lord one thousand eight hundred and ninety-
t.

NATHAN GOFF,
U. S. Circuit Judge, Fourth Circuit.

ue and legal notice of the within citation is hereby acknowl-
d this November 30th, 1898.
POSTAL TELEGRAPH-CABLE CO.,
By J. R. McINTOSH, *Counsel.*

110 *Order to Transmit Record.*

UNITED STATES OF AMERICA, }
Western District of No. Ca. }

In the Circuit Court, Fourth Circuit, at Greensboro.

And thereupon, it *is* ordered by the court here that a transcript of the record and proceedings in the case of Postal Telegraph-Cable Company *vs.* The Southern Railway Company, together with all things thereunto relating, be transmitted to the said circuit court of appeals for the fourth circuit; and the same is transmitted accordingly.

Test: SAM'L L. TROGDON, *Clerk.*

Clerk's Certificate.

I, S. L. Trogdon, clerk of the circuit court of the United States for the western district of North Carolina, at Greensboro, in said district, do hereby certify that the foregoing is a true, full, and complete transcript of the record and proceedings in the case of The Postal Telegraph-Cable Company *vs.* The Southern Railway Company, as fully as appears from the original papers and records in this office.

Seal of the Court.

In testimony whereof, I have hereunto set my hand and affix- the seal of said court at office in the city of Greensboro, in said district, on this the 7th day of December, A. D. 1898.

SAM'L L. TROGDON,
Clerk of the said Circuit Court.

111 On the same day, to wit, December 8, 1898, the appearance of Stiles and Holladay, Esquires, and F. H. Busbee, Esquire, is entered for the plaintiff in error, and the appearance of J. R. McIntosh, Esquire, is entered for the defendant in error.

Afterwards, to wit, on the 6th day of February, 1899, the defendant in error, by its attorney aforesaid, filed in our circuit court of appeals here the following motion to dismiss, to wit:

Motion to Dismiss Appeal.

Filed February 6, 1899.

United States Circuit Court of Appeals, Fourth Circuit.

SOUTHERN RAILWAY COMPANY }
against
POSTAL TELEGRAPH-CABLE COMPANY. }

And now comes the appellee, The Postal Telegraph-Cable Company, by J. R. McIntosh, counsel, and moves the court to dismiss, for the reasons hereinafter stated, the appeal herein of the 29th day

nber, 1898, taken by The Southern Railway Company, ap-
from the orders of November the 9th, 1898, and other orders
ircuit court of the United States for the district of North
, to which exceptions were taken by appellant and assigned
, namely:

ause this court has no jurisdiction of this cause.

ause the order of his honor Charles H. Simonton, to which
of error was taken, was not a final order or judgment.

ause the writ of error in this cause was improvidently
by his honor Nathan Goff, as circuit court judge, and erro-
eously directed to the judges of the circuit court, not to the
ircuit court in which his honor Judge Simonton then pre-
ided.

ause the citation in said cause was improperly signed by
or Judge Goff.

ause his honor Judge Simonton had previously overruled
ied the application of plaintiff in error for a writ of error in
ise.

cause the case being a special proceeding for a condemna-
right of way for and by the defendant in error along and
e right of way of the plaintiff in error, *in* the exercise of the
eminent domain in the State of North Carolina, under and
e of the statutes of said State, was wholly and exclusively
the sovereign power and jurisdiction of said State, and was
ject to removal from the State court of North Carolina, in
aid proceeding was instituted, to the Federal court.

ecause, if removable at all, it was prematurely removed, inas-
s the State court had exclusive jurisdiction to determine the
defendant in error to the proceeding, and the Federal court
ake jurisdiction, if at all, alone to adjudicate the amount of
s to which the plaintiff in error was entitled from defendant
r.

ecause the matter in dispute does not exceed in value the
$2,000, including interest and costs, the plaintiff in error
ntitled in the law to only nominal damages from the defend-
error, which was so determine- by the superior court of Guil-
unty, North Carolina, in which the proceeding was instituted
defendant in error, that fact appearing from the pleadings
ause.

ecause there is no error upon the face of the record of which
intiff in error can complain.

——— ———,
Counsel for Appellee.

As counsel for the appellant in the above-styled cause, we
acknowledge service of the above notice on this 6th day of
ry, 1899, without waiver of any rights.

STILES & HOLLADAY.

he February term, 1899, of our said circuit court of appeals,
on the 18th day of February, 1899, the said cause came on

be heard, and was argued generally by counsel as well as upon he transcript of the record as upon the motion to dismiss.

Afterwards, at the same term, to wit, on the 30th day of March, 899, the court here announced and filed its opinion, which is as ollows, to wit:

Opinion.

14 United States Circuit Court of Appeals, Fourth Circuit.

THE SOUTHERN RAILWAY COMPANY, Plaintiff in Error, *vs.* THE POSTAL TELEGRAPH-CABLE COMPANY, Defendant in Error.	No. 298. Error to the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

Motion by defendant in error to dismiss.

(Argued Feb. 18, 1899; decided March 30, 1899.)

Before Goff, circuit judge, and Morris and Brawley, district judges.

Robert Stiles, A. L. Holladay, F. H. Busbee, for plaintiff in error
. R. McIntosh, for the defendant in error.

Statement.

On June 11, 1898, the Postal Telegraph-Cable Company, a corporation of New York, filed in the office of the clerk of the superior ourt of Guilford county, North Carolina, a petition, making The outhern Railway Company the sole defendant, to obtain by condemnation the right to construct, maintain and operate a
15 telegraph line along and upon the right of way of the Southern Railway Company from a point on the State line between the States of North Carolina and Virginia south to Charlotte, nd from Greensboro, in Guilford county, to the city of Raleigh, assing through the intervening counties, the whole distance being bout 193 miles.

This petition was filed under the provisions of article 49 of the ode of North Carolina of 1883, and under sections 2007 to 2013, hich provide that any telegraph company, incorporated in North arolina or any other State, shall have the right to construct, maintain and operate lines of telegraph along any railroad in that State, o be so constructed and maintained as not to obstruct or hinder he usual travel on said railroad, upon making just compensation herefor, and further providing in what manner proceedings for ondemning such a right should be conducted.

The Southern Railway Company, a corporation of Virginia, appeared and filed its petition for removal on the ground of diverse itizenship, and such proceedings were had that the case was removed into the circuit court of the United States for the western istrict of North Carolina. (Opinion of Judge Simonton, 88 Fed. Rep., 303.)

lway company resisted the proceedings upon various nong others, that there was then no law in North Caro- ding for the condemnation of land or rights of way for elegraph companies, that if there was such a law, the the telegraph company did not in essential particulars nd that the petition was too vague and uncertain in its f the nature of the tenure by which the railroad com- the right of way over which the easement for the tele- pany was sought to be condemned. These objections uled (opinion of Judge Simonton, 89 Fed. Rep., 190), and ordered on September 15, 1898, as provided by section e North Carolina Code of 1883, that three commissioners ed to assess the damages which the railway would sus- son of the erection of the petitioner's telegraph line it r proposed, and that they should hear the testimony and r award in writing, and file it with the clerk of the t.

ubsequently, upon the petition of the railway company eave to answer the original petition, leave was granted he order for the appointment of the commissioners was

The answer was filed, setting up much the same objec- had already been passed upon, with the additional allega- t that the railway company's right of way was in some arrow that to erect a telegraph line upon it as proposed tion would imperil the safe operation of the railroad and hinder the usual travel upon it, and that condemnation s must be instituted in each and every county in which land used by the railroad company for its line is owned . To this answer the telegraph company demurred, and sustained the demurrer (opinion of Judge Simonton, 90 30), and by its order of October 24, 1898, reinstated the inting commissioners. To the granting of these orders company has sued out a writ of error to bring the case view.

graph company moves to dismiss the writ of error as providently to an order which was interlocutory and

Opinion.

istrict Judge:

that a writ of error or appeal does not lie except to a ment which determines the controversy between the o conclusively settled that the burden is upon the plain- or to show that this is a case to which that general rule pply.

tention of the plaintiff in error is that it is not appealing rder of appointing commissioners, but from the action of elow in refusing to allow it to introduce testimony to contention that the proposed telegraph line could not be ted and operated as not to obstruct and hinder the usual n the railroad.

s contention is that in an adversary proceeding in court for con-
nation there are two separate and successive proceedings, the
first of which determines the right to condemn, and the second
the amount of compensation; and that the first of these, even
when the right to condemn is sustained, is a final and appeal-
judgment, although not made so by statute.

here can be found no case in the decisions of the Supreme Court
he United States which has so held. In the case of *Belmont*
dge vs. Wheeling Bridge, 138 U. S., 287, the Supreme Court did
d that the judgment in that case for the condemnation was a
l appealable judgment, but this was solely upon the ground that
case came to the Supreme Court by writ of error to the supreme
rt of appeals of West Virginia, and that it had been held by that
rt that the judgment was final under the West Virginia statute.
Justice Field said: "The judgment appears to have been con-
ered as so far final as to justify an appeal from it; and if the
reme court of a State holds a judgment of an inferior court of
State to be final, we can hardly consider it in any other light in
rcising an appellate jurisdiction."

n *Luxton vs. North River Bridge Co.*, 147 U. S., 337–342, Mr. Jus-
Gray, commenting on the ruling in the case just above quoted,
l: "To have held otherwise might have wholly defeated the
ellate jurisdiction of this court under the Constitution and laws
the United States; for if the highest court of the State held the
er appointing commissioners to be final and conclusive unless
ealed from, and the validity of the condemnation not to be open
a subsequent appeal from the award of damages, it is difficult to
how this court could have reached the question of the validity
he condemnation except by writ of error to the order appointing
nmissioners. That case, therefore, affords no precedent or reason
sustaining this writ of error to the circuit court of the United
tes."

Even if the fact was pertinent, in condemnation proceedings
der the provisions of the State law when conducted in a circuit
rt of the United States, that the State court had held the appoint-
nt of commissioners to be a final appealable order, the plaintiff
error cannot have the benefit of such a contention in the present
e, for the reason that the supreme court of North Carolina has
decided to the contrary with respect to the very statute under
which these proceedings were taken. In *American Union*
Telegraph Company vs. Wilmington, &c., Railroad Company,
N. C., 420, the supreme court of North Carolina held, in a similiar
ceeding to condemn a right of way for the construction and
eration of lines of telegraph along the defendant's railroad, that
appeal was allowable from the order adjudging that the petitioner
s entitled to the right of way demanded and appointing commis-
ners to ascertain and report the compensation to be paid to the
fendant railroad as damages for the condemned property. The
rt said: "Upon a careful examination of the statute, and the por-
ns of the act of February 8, 1872, by reference incorporated with
and regarding the policy indicated in both to favor the construc-

completion of such works of internal improvement,
ing upon the same footing as railroad corporations,
ion it was not intended in these enactments to arrest
gs authorized by them at any intermediate stage, and
s only from a final judgment. Then and not before
r committed during the progress of the cause and
ect of exception at the time be reviewed and corrected
te court, and an appeal from an interlocutory order is
l unauthorized.".

vs. Railroad, 98 N. C., 431, the supreme court of
a again held that under the law of that State the order
mmissioners to assess damages is interlocutory, and no
entertained until after final judgment upon the report
sioners, and said: "This case is in all material respects
Co. vs. The R. R. Co., 83 N. C., 420; *Commissioners vs.*
, 18; *Railroad vs. Warren*, 92 N. C., 620. They settle
practice in such proceedings as the present one and
ate the reasons for it."

Luxton vs. North River Bridge Co., 147 U. S., 337–341,
s, we think, conclusive of the present question, for in
as held by the Supreme Court of the United States that
proceedings in the circuit court of the United States
by the act of Congress to be according to the laws of
hin which the land to be condemned was located, and
t State law the appointment of the commissioners
be reviewed by the supreme court of the State on writ
iorari, yet so much of the State law as allowed such
applicable to a proceeding in the circuit court of the
s. The court said: "The case throughout, from the
the corporation for the appointment of commissioners
ages to the owner of the land proposed to be taken,
nt upon the award of the commissioners or upon ver-
, assessing those damages, remains in the circuit court
l States and under its supervision and control. The
t court in this case, as in other cases on the common-
not reviewable by this court by writ of certiorari.
vs. Young, 94 U. S., 258; but only by writ of error,
ot lie until after judgment disposing of the whole case
ting all the rights, whether of title or of damages, in-
e transaction. The case is not to be sent up in frag-
cessive writs of error.
tember 24, 1789, ch. 20, sec. 22, 1 Stat. 84. Rev Stat.,

rford vs. Fisher, 4 Dall., 22.
mbe vs. McKusick, 20 How., 552, 554.
ana Bank vs. Whitney, 121 U. S., 284.
ne Co. vs. Martin, 132 U. S., 91.
urkey vs. Toledo & Ohio Railway, 146 U. S., 536."

or dismissed for want of jurisdiction.

03

Afterwards, at the same term, to wit, on the 31st day of March, 1899, the court here made and entered the following nt, to wit:

Judgment.

nited States Circuit Court of Appeals, Fourth Circuit.

THERN RAILWAY COMPANY, Plaintiff in Error,
vs.
TELEGRAPH-CABLE COMPANY, Defendant in Error. } No. 298.

the circuit court of the United States for the western district of North Carolina, at Greensboro.

cause having been called in the regular order for argument defendant in error having moved the court to dismiss the error, the said cause was argued generally, by counsel, on nscript of the record as well as upon the motion to dismiss. onsideration whereof, the court being of opinion that there final judgment of the said circuit court in this cause from writ of error could lie, it is now here ordered and adjudged court that the writ of error sued out in this cause be, and e is hereby, dismissed with costs.
andate issue.
h 31, 1899.

NATHAN GOFF.

thereupon, afterwards, to wit, on the 1st day of April, 1899, ndate of the said circuit court of appeals was issued and ransmitted to the said circuit court of the United States for he western district of North Carolina, at Greensboro; which aid mandate is as follows, to wit:

Mandate.

STATES OF AMERICA, *ss:*

esident of the United States of America to the honorable udges of the circuit court of the United States for the western ct of North Carolina, Greeting:

reas lately, in the circuit court of the United States for the district of North Carolina, before you or some of you, in a etween The Postal Telegraph-Cable Company, complainant, e Southern Railway Company, defendant, wherein the de- nd orders of the said circuit court entered in the said cause gust 31, 1898; September 15, 1898; September 19, 1898; r 24, 1898, and October 24, 1898, are in the words following.

cause came before me, at Asheville, to be heard on the pe- emoved into this court and demurrer thereon, it is ordered, ed and decreed, that the demurrer be overruled.

It is ordere Greensboro, N competent freel before him. T sioners to asses may sustain b the stretching Company, as p That the said oath prescribed shall proceed i such damages, be just for sa premises. The court-house of which 122 thorized to the sa they may deen to the benefit t to it. The fir clerk shall giv ten days after parties to this their conclusio to writing and of this court a

The defenda

That pursua ton, on the 1 above-entitled disinterested f the said South of the construc the plaintiff, T the assembling bearing upon pointed as con Walker, and J upon whom se them to appea room of the U 30th, 1898, at notice and be

Done this 1 seal of this co

[SEAL.]

123 This leave o notice and m

hat S. L. Trogdon, Esq., clerk of this court at
Carolina, do appoint three disinterested and
lers resident in this district, and summons them
the said persons so selected shall act as commis-
e damages which the Southern Railway Company
eason of the erection of the telegraph poles and
the wires thereon of the Postal-Telegraph Cable
osed in the petition of said company to this court.
mmissioners shall take before the said clerk the
section 1946 of the Code of North Carolina, and
ll respects as required in said code in assessing
imating and assessing such compensation as may
Southern Railway Company by reason of the
id commissioners shall hold their meetings in the
United States, in the city of Greensboro, over
tings said clerk shall preside, and they are au-
nd empowered to take such testimony in respect
damages to the said Southern Railway Company as
ertinent, not, however, extending their inquiry as
derived to the telegraph Co., or the value thereof,
meeting of the commissioners, of which the said
ne notice to them and to the parties, shall be held
ice of their appointment has been served on the
use. After hearing the evidence and reaching
the said commissioners shall reduce their award
n and seal the same and file it with the said clerk
reensboro.

The Southern Railway Co., hereby take notice:
to an order made by his honor Chas. H. Simon-
day of September, 1898, to me directed in the
se, commanding me to appoint and summons three
nolders as commissioners to assess the damage of
Railway Co., which may accrue to same by reason
n of a line of telegraph along the right of way by
Postal Telegraph-Cable Co., and to fix a time for
said commissioners, and the taking of testimony
issues by them to be tried; I have this day ap-
ssioners in said cause Alfred M. Scales, John M.
ddison Hodgin, residents of Guilford county, N. C.,
ce of summons has this day been had, requiring
nd sit upon the hearing of said cause in the court-
circuit court in Greensboro, N. C., on September
o'clock a. m. Of such proceedings you will take
verned accordingly.
day of September, 1898, as witness my hand and

SAM'L L. TROGDON, *Clerk.*

came the defendant railway company and by
urt filed its answer to the complainant's written
n, to which said answer the plaintiff telegraph

company demurred, and after argument of counsel, and the matter being duly considered by the court, said demurrer is hereby sustained, and the defendant having asked leave to introduce testimony sustaining the averments of its answer, which leave was refused by the court.

It is therefore ordered, that the former order made by this court, directing the clerk of this court at Greensboro, North Carolina, to appoint commissioners to assess the damages in the above-entitled cause, is hereby reinstated; and the clerk of this court is directed to fix a day not earlier than ten days after the entry of this order for the meeting of said commissioners, to all of which action of the court, except leave of the court to the defendant to file its answer, the defendant excepts.

To A. M. Sales, J. M. Walker, and Jas. A. Hodgin, commissioners in the above-entitled case:

You are hereby summoned and directed to appear and be in the court in the U. S. building, at Greensboro, N. C., on November 3rd, 1898, at 10 o'clock a. m., at which time and place a hearing will be had by you for the purpose expressed in the order of his honor Charles H. Simonton authorizing your appointment and in the notice heretofore served on you.

Witness my hand and seal of this court October 24, 1898.

[SEAL.] SAM'L L. TROGDON, *Clerk.*

As by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the fourth circuit by virtue of the writ of error sued out by the Southern Railway Company, agreeable to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the term of February, in the year of our Lord one thousand eight hundred and ninety-nine, the said cause came on to be heard before the said United States circuit court of appeals for the fourth circuit on the said transcript of record, and having been called in the regular order for argument, and the de-
124 fendant in error having moved the court to dismiss the writ of error, the said cause was argued generally by counsel on the transcript of the record as well as upon the motion to dismiss.

On consideration whereof, the court being of opinion that there was no final judgment of the said circuit court in this cause from which a writ of error could lie, it is now here ordered and adjudged by this court that the writ of error sued out in this cause be, and the same is hereby, dismissed with costs.

Let mandate issue.

NATHAN GOFF.

March 31, 1899.

You, therefore, are hereby commanded that such further proceedings be had in said cause by way of execution as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the first day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

HENRY T. MELONEY,
Clerk of the U. S. Circuit Court of Appeals for the Fourth Circuit.

Costs of Defendant in Error.

Clerk	$15.80
Attorney	20.00
	$35.80

Afterwards, to wit, on the third day of May, 1899, the Southern Railway Company, by its attorneys, filed its petition for a writ of error, together with an assignment of errors, which are as follows:

Petition for Writ of Error.

Filed May 3, 1899.

In the United States Circuit Court of Appeals for the Fourth Circuit.

125 SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
POSTAL TELEGRAPH-CABLE COMPANY, Defendant in Error.

To the honorable judges of the United States circuit court of appeals for the fourth circuit:

Your petitioner, The Southern Railway Company, respectfully represents that it is the sole defendant in a condemnation proceeding instituted in the superior court of Guilford county, North Carolina, by the Postal Telegraph-Cable Company against the Southern Railway Company, which was removed from said State court to the circuit court of the United States for the western district of North Carolina, and was brought by your petitioner from the last-named court to this honorable court by writ of error and placed on the docket of this court under the style of Southern Railway Company, plaintiff in error, against Postal Telegraph-Cable Company, defendant in error.

2. Your petitioner conceiving itself aggrieved by the order made herein by said circuit court of appeals on the 31 day of March, 1899, particularly described in its assignment of errors hereto annexed, and also conceiving itself aggrieved by the order of the circuit court of the United States made herein on the 24th day of October, 1898, particularly described in its assignment of errors hereto annexed, and also conceiving itself aggrieved by two orders made by said circuit court dated August 31, 1898, and September 15, 1898, and by two orders of the clerk of said circuit court, at Greensboro, dated, respectively, September 15, 1898, and October 24, 1898,

does hereby appeal from said order of said circuit court of appeals dated March 31st, 1899, and said order of said circuit court dated October 24, 1898 (and all of the above-recite l orders of said circuit court and of the clerk thereof), to the Supreme Court of the
126 United States for the reasons set out and specified in the assignment of errors filed herewith, and your petitioner prays that a writ of error and supersedeas may be allowed it in respect to all of the aforesaid recited orders, including the order made by said circuit court of appeals, the several orders made by said circuit court, and the several orders made by the clerk of said circuit court; that a transcript of the record upon which said orders were made, duly authenticated, may be sent to the Supreme Court of the United States, that said order of said circuit court of appeals dated March 31st, 1899, and said order of said circuit court dated October 24, 1898, and all other orders made by said circuit court and by the clerk of said circuit court may be reviewed and reversed by the Supreme Court of the United States.

3. And your petitioner prays for such other, further, and general relief as may be proper in matters of this character.

And your petitioner will ever pray, &c.

SOUTHERN RAILWAY CO.,
By STILES & HOLLADAY,
As Its Counsel.

Assignment of Errors.

Filed May 3, 1899.

In the United States Circuit Court of Appeals for the Fourth Circuit.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
POSTAL TELEGRAPH-CABLE COMPANY, Defendant in Error.

Assignment of errors.

Assignment of errors filed by the Southern Railway Com-
127 pany with its petition for a writ of error to an order made by the United States circuit court of appeals for the fourth circuit in the cause of Southern Railway Company, plaintiff in error, against Postal Telegraph-Cable Company, defendant in error, on the 31st day of March, 1899, and to an order of the circuit court of the United States for the western district of North Carolina on October 24th, 1898, in said suit, which was then depending in said circuit court under the style of Postal Telegraph-Cable Company against Southern Railway Company.

And now, on this the — day of May, 1899, came the petitioner, The Southern Railway Company, by Stiles & Holladay, its attorneys, and says that the orders entered in this suit, to wit, said order entered by said circuit court of appeals dated March 31, 1899, and the orders entered by said circuit court dated August 31, 1898; Septem-

ber 15, 1898, and October 24, 1898, and the orders entered by the clerk of said circuit court dated September 19, 1898, and October 24, 1898, are erroneous and against the right of your petitioner, and your petitioner, The Southern Railway Company, assigns for error and will contend in the Supreme Court of the United States that said circuit court of appeals and said circuit court erred as follows:

First.

1. That said circuit court of appeals erred in its order of March 31, 1899, in holding and deciding that the order of said circuit court dated October 24, 1898, was an interlocutory order, and erred in dismissing the writ of error and supersedeas allowed by said circuit court on November 29, 1898. A copy of the order of said circuit court allowing said writ of error and supersedeas will be found at pages 95, 96 of the printed record (used in said circuit court of appeals).

That said circuit court of appeals should have held and decided that said order of October 24, 1898, a copy of which will be
128 found at pages 69, 70 of said printed record, was a final order.

2. That said circuit court of appeals erred in failing to hold that the order of said circuit court of August 31, 1898, overruling your petitioner's motion to dismiss the several petitions of the Postal Telegraph-Cable Company filed in this cause, for that said petition of said Postal Telegraph-Cable Company did not state facts and grounds sufficient to constitute a cause of action, was erroneous. Said circuit court of appeals should have reversed said circuit court and sustained your petitioner's motion to dismiss all of said petitions of said Postal Telegraph-Cable Company for the reasons written out and numbered from 1 to 16, inclusive, to be found at pages 96 to 101, inclusive, of said printed record in a paper marked "Stipulations of counsel;" which said records, numbered from 1 to 16, inclusive, are prayed to be taken, treated, and read as a part of this assignment of errors as if here set out and again repeated at full length.

Second.

The appellant, The Southern Railway Company, further submits and will contend in the appellate court that the order of the circuit court herein dated September 15, 1898, was erroneous and should be reversed for the sixteen reasons above assigned as error committed by the circuit court in its order overruling your petitioner's motion to dismiss the plaintiff's petitions because they failed to state facts and grounds constituting a cause of action, and also because said order of September 15, 1898, was prematurely entered and without notice to your petitioner, and because neither said order of September 15, 1898, nor the powers, duties, and proceedings of the commissioners thereby directed to be appointed, as set out in said order, were authorized by law, and also because the
129 court, in the entry of said order, erred in directing its clerk to appoint commissioners to assess damages, as therein set

out, and erred in prescribing the oath to be taken by said commissioners, and in directing the mode of procedure and the principles and rules by which said commissioners should be governed, and erred in fixing the place for the sessions of said commissioners and how they shall be presided over and the elements to be considered by them and the form and substance of their report; and your petitioner submits and will contend in the Supreme Court of the United States that said circuit court of appeals should have reversed said circuit court and should have held that said circuit court erred in each, all, and every of the particulars set out in this paragraph.

Third.

The appellant, The Southern Railway Company, further submits and will insist in the appellate court that the order herein of September 19, 1898, made by Samuel L. Trogdon, clerk of said circuit court, was erroneous and should be reversed because the said clerk had no lawful authority to make said order and because said order was erroneous for the same reasons above set out in respect to the circuit court's aforesaid order of September 15, 1898; and your petitioner will submit and contend in the Supreme Court of the United States that said circuit court of appeals should have reversed said circuit court and the clerk thereof and said order made by said clerk dated September 19, 1898, and should have held that said circuit court and said clerk erred in each, all, and every of the particulars set out in this paragraph.

Fourth.

The appellant, The Southern Railway Company, submits and will insist in the appellate court that the order of said circuit
130 court herein of October 24, 1898, sustaining the plaintiff's demurrer to defendant's answer, refusing to allow your petitioner to introduce evidence in support of the allegations of its answer and otherwise ordering as therein ordered, was erroneous and should be reversed for all of the reasons above assigned for reversing the orders of said circuit court dated August 31, 1898, and September 15, 1898; and, further, because the circuit court by said order of October 24, 1898, refused to hear the proofs of your petitioner and decided against your petitioner without giving it an opportunity to introduce its proofs and be heard, and said circuit court erred in not holding that your petitioner's answer set up a complete defense. Said circuit court should have given your petitioner an opportunity to be heard, should have heard the proofs of your petitioner, and should have held that each of the grounds of defense set up in its said answer (which said grounds are prayed to be treated and considered as if here again inserted at full length) constitute a full and complete defense to the plaintiff's petitions and required their dismissal by the court, and for the reasons aforesaid said circuit court erred in reinstating the aforesaid order of said circuit court dated September 15, 1898, and in directing the clerk of said circuit court to fix a day for the meeting of the com-

ers appointed by him, and your petitioner will submit and
in the Supreme Court of the United States that said circuit
appeals should have reversed said circuit court, and should
ld that said circuit court erred in each, all, and every of the
lars set out in this paragraph.

Fifth.

ppellant will also submit and insist in the appellate court
e order made by Samuel L. Trogdon, clerk of said court,
lated October 24, 1898, was erroneous and should be reversed
or the reasons above assigned as to his order of September
9, 1898, and your petitioner will submit and contend in the
e Court of the United States that said circuit court of ap-
ould have reversed said circuit court and the clerk thereof,
uld have held that said clerk & circuit court erred in each,
every of the particulars set out in this paragraph.

Sixth.

circuit court of appeals erred in failing to reverse the order
circuit court dated October 24, 1898, for the following rea-
z:

Because said order of October 24, 1898, deprives your peti-
f its property without due process of law, in violation of the
ution of the United States.

Because said order denies to your petitioner the equal pro-
of the laws.

Because said order determines without proof conditions
nt to the condemnation of your petitioner's property.

Because said order refused to hear the proofs of your peti-
as required by section 1945 of the Code of North Carolina.

Because said order refused to permit your petitioner to
ce its proofs and denied to your petitioner an opportunity
eard in its defense.

Because said order refused to hear proofs, and refused to
ur petitioner an opportunity to be heard in its defense, and
t proof determined that the Postal Telegraph-Cable Company
ke possession of and use and exercise dominion and control
e property of your petitioner for the purposes of said tele-
graph company without any further order of said circuit court.

(G.) Because said order, in violation of the Constitution of the United States, delegated to the clerk of said court the of selecting and appointing disinterested freeholders to act as ssioners, and authorized said clerk to preside over said com-
ers.

Because said order delegated to said clerk powers vested in
cuit court of the United States and in said circuit court only.

Seventh.

the foregoing and other reasons appearing upon the face of
resaid orders and proceedings had in this cause, your peti-
prays for a writ of error and supersedeas to said order of said

circuit court of appeals dated March 31, 1899, and said order of said circuit court dated October 24, 1898, and that said two orders and all of the hereinbefore-mentioned orders of said circuit court and its clerk may be reviewed and reversed by the Supreme Court of the United States.

SOUTHERN RAILWAY CO.,
By STILES & HOLLADAY,
As Its Counsel.

Order Allowing Writ of Error.

Filed May 3, 1899.

In the United States Circuit Court of Appeals for the Fourth Circuit.

SOUTHERN RAILWAY COMPANY
vs.
POSTAL TELEGRAPH-CABLE COMPANY.

133 This day came the Southern Railway Company, by Stiles & Holladay, its counsel, and filed its petition, with an assignment of errors thereto attached, praying a writ of error and supersedeas from the Supreme Court of the United States to the United States circuit court of appeals for the fourth circuit as to the order of the latter court made on the 31st day of March, 1899, as prayed in said petition and assignment of errors.

And thereupon it is ordered that a writ of error and supersedeas be, and the same are hereby, allowed said Southern Railway Company as to said order of March 31, 1899, as prayed in said petition and assignment of errors; but said Southern Railway Company, or some one for it, shall within ten days after this day file in the papers of this cause in the clerk's office of this court a bond in the penalty of $5,000.00, as provided by law, with surety to be approved by one of the judges of this circuit.

May 3, 1899.

NATHAN GOFF,
U. S. Circuit Judge, Fourth Circuit.

Writ of Error Bond.

Filed May 5, 1899.

Know all men by these presents that we, Jno. P. Stith, as principal, and the Virginia Trust Company, as sureties, are held and firmly bound unto the Postal Telegraph-Cable Company in the full and just sum of five thousand dollars, to be paid to the said The Postal Telegraph Cable Company, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a United States circuit court of appeals
r the fourth circuit, in a suit depending in said court be-
ne Southern Railway Company, plaintiff in error, and The
elegraph Cable-Company, defendant in error, a judgment
lered against the said Southern Railway Company, and the
thern Railway Company having obtained a writ of error
l a copy thereof in the clerk's office of the said court to
he judgment in the aforesaid suit, and a citation directed
id The Postal Telegraph-Cable Company, citing and admon-
to be and appear at a Supreme Court of the United States
lden at Washington, on the 13th day of June next:
the condition of this obligation is such that if the said
n Railway Company shall prosecute said writ of error to
d answer all damages and costs if it fail to make its plea
en the above obligation to be void; else to remain in full
d virtue.

JOHN P. STITH. [SEAL.]
VIRGINIA TRUST COMPANY, [SEAL.]
By MANN S. QUARLES, *Vice-Pres't.* [SEAL.]

of Virginia Trust Co.]

l and delivered in presence of—

——.

-cent revenue stamp attached.

oved by—
NATHAN GOFF,
U. S. Circuit Judge.

rsed: Approved May 5, '99. Melville W. Fuller, Chief Jus-
iled May 5, 1899.

Writ of Error.

Filed May 5, 1899.

STATES OF AMERICA, *ss:*

esident of the United States to the honorable the judges of
Jnited Staes circuit court of appeals for the fourth circuit,
ting:

use in the record and proceedings, as also in the rendition of
lgment of a plea which is in the said United States circuit
f appeals, before you or some of you, between The Southern
y Company, plaintiff in error, and The Postal Telegraph-
Company, defendant in error, a manifest error hath happened,
great damage of the said plaintiff in error, as by its complaint
s, we, being willing that error, if any hath been, should be duly
ed and full and speedy justice done to the parties aforesaid in
half, do command you, if judgment be therein given, that
nder your seal, distinctly and openly, you send the record

d proceedings aforesaid, with all things concerning the same, to Supreme Court of the United States, together with this writ, so t you have the same in the said Supreme Court, at Washington, hin 30 days from the date hereof, that, the record and proceed- s aforesaid being inspected, the said Supreme Court may cause ther to be done therein to correct that error what of right and ording to the laws and customs of the United States should be done.

l of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

MELVILLE W. FULLER,
Chief Justice of the United States.

And to operate as a supersedeas on bond approved already by dge Goff.

MELVILLE W. FULLER,
Chief Justice.

[Endorsed:] 298. Writ of error.

6 A copy of said writ of error is lodged in the clerk's office on this May 5, 1899.

HENRY T. MELONEY, *Clerk.*

7 *Citation.*

May 5, 1899.

NITED STATES OF AMERICA, *ss:*

the Postal Telegraph-Cable Company, Greeting:

You are hereby cited and admonished to be and appear at a Su- eme Court of the United States, at Washington, within 30 days om the date hereof, pursuant to a writ of error filed in the clerk's ice of the United States circuit court of appeals for the fourth rcuit, wherein The Southern Railway Company is plaintiff in ror and you are defendant in error, to show cause, if any there be, hy the judgment rendered against the said plaintiff in error, as in e said writ of error mentioned, should not be corrected and why eedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the nited States, this 5th day of May, in the year of our Lord one ousand eight hundred and ninety-nine.

MELVILLE W. FULLER,
Chief Justice of the United States.

[Endorsed:] 298. Citation. I acknowledge service of the within ation this May 16, 1899. J. R. McIntosh, counsel for the Postal elegraph-Cable Co.

Order to Transmit Record.

upon it is ordered by the court here that a transcript
l and proceedings in the cause aforesaid, together with
hereunto relating, be transmitted to the Supreme Court
d States; and the same is transmitted accordingly.

HENRY T. MELONEY, *Clerk.*

Clerk's Certificate.

ATES OF AMERICA, *ss:*

T. Meloney, clerk of the United States circuit court of
he fourth circuit, do certify that the aforegoing is a true
f the record and proceedings in the therein-entitled cause
remains upon the records and filed of the said circuit
peals.

l States Cir-
t of Appeals,
ircuit.

In testimony whereof I hereto set my hand and affix the seal of the said United States circuit court of appeals for the fourth circuit, at Richmond, on this 18th day of May, A. D. 1899.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

on cover: File No., 17,417. U. S. C. C. of appeals, 4th
rm No., 303. The Southern Railway Company, plaintiff
The Postal Telegraph-Cable Company. Filed May 22,

892. 803

Office Supreme Court U. S.
FILED
MAY 22 1899
JAMES H. McKENNEY,
Clerk.

IN THE

preme Court of the United States.

OCTOBER TERM, 1898.

No. 892.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

HE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

Error to the United States Circuit Court of Appeals,
Fourth District.

sons why the Defendant's Motion to Dismiss or Modify the Writ should not Now be Heard.

ROBERT STILES, RICHMOND, VA.,
ADDISON L. HOLLADAY, RICHMOND, VA.,
Of Counsel for Plaintiff in Error.

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IN THE

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OCTOBER TERM, 1898.

No. ——

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

TAL TELEGRAPH-CABLE COMPANY,
Defendant in Error.

**the United States Circuit Court of Appeals,
Fourth District.**

**gned by the Plaintiff in Error why the Motion
fendant in Error to Dismiss the Writ of
or to Modify the Supersedeas hereto-
ore Granted Should Not be Now
Heard.**

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vill permit us to say, at the outset, that the paper
is not in any proper sense *a brief* in opposition
of the defendant in error. Not only would it
as hereinbelow more fully set forth, to produce
rief within the time when, according to notice,

the motion to dismiss will be made and pressed; but the effort—necessarily vain—to produce and to submit such brief might, under the law and practice of the Court, be taken as a *waiver* of the position, upon which we confidently rely, that no discussion of the merits of the motion will be at present expected or required of the plaintiff in error, and that the Court will not consider the motion, until full opportunity shall be accorded him to prepare and submit his defense thereto.

INSUFFICIENT NOTICE.

On Thursday, the 18th day of May, 1899, the following notice was served by the Marshal upon the counsel for the plaintiff in error—a telegram containing in brief the same information having been left at the office of said counsel late the preceding evening:

(Copy of First Notice.)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

THE SOUTHERN RAILWAY COMPANY, Appellant,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY, Appellee.

Motion to dismiss Writ of Error or for Modification of Supersedeas on said Writ.

Messrs. STILES & HOLLIDAY,

Attorneys for Southern Railway Co., Appellant,

Richmond, Va.

You are hereby notified that in the Supreme Court of the United States of America, at Washington, D. C., on Monday, the 22nd day of May, 1899, at 12 o'clock M., or as soon thereafter as counsel can be heard, The Postal Telegraph-Cable Company, Appellee in this action, by its attorney, will move the said court to dismiss the writ of error heretofore granted by the Honorable Chief Justice of the United States, and in

the event the motion to dismiss should be refused, then to modify the supersedeas granted with the said writ, at which time and place you may appear if you see proper, and oppose the same.

[Signed] J. R. McINTOSH.

Counsel for The Postal Telegraph-Cable Company, Appellee.

May 17th, 1899.

At 10.55 A. M. on Friday, May 19, 1899, the following notice, containing, it will be observed, no designation of the time when the motion will be submitted—was left at the office of counsel for the plaintiff in error, by a messenger from the counsel whose name is signed to the motion, and, with this notice, was served a copy of the brief of said counsel, in support of said motion:

(Copy of Second Notice.)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

No. ——.

THE SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY, Defendant in Error,

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH DISTRICT.

Motion by the Defendant in Error to Dismiss..

Now comes the defendant in error, The Postal Telegraph-Cable Company, by J. R. McIntosh, Counsel, and moves the court to dismiss the writ of error in this cause, (1) because this court has no jurisdiction of the same; (2) if the motion is not sustained, then, that the *supersedeas* upon the writ of error from this court be modified, so that during the pendency of the

writ, it will not prevent or hinder the defendant in error from occupying the premises appropriated for its use and proceeding to erect and operate its line of telegraph thereon, pending said writ of error.

[Signed] J. R. McINTOSH,
Counsel for Motion.

The order allowing the present writ of error and supersedeas was made on May 4th, 1899, and the supersedeas bond, in the penalty of $5,000.00 with the Virginia Trust Company as security, was then taken and approved by Honorable Nathan Goff, Circuit Judge, who had, after full argument, allowed the writ of error from the Circuit Court to the Circuit Court of Appeals to operate as a supersedeas—had presided at the full and extended hearing in the latter court—had entered a subsequent order in the Circuit Court—who was cognizant of all subsequent action in the cause, and upon whose action, in making the order allowing a writ of error and supersedeas, taking and approving the supersedeas bond, and signing a citation and writ of error, intended to operate as a supersedeas, the Chief Justice of this Honorable Court based his action, in signing the present writ of error to operate as a supersedeas and approving the supersedeas bond, already approved by Honorable Nathan Goff, Circuit Judge, and signing the existing citation herein. The three last mentioned papers were duly filed in the Clerk's office of the Circuit Court of Appeals at Richmond, Virginia, on May 6th, 1899, together with copies of said writ of error and citation. A copy of Judge Goff's said order of May 4th, 1899, and the original form of writ of error and citation signed by him are filed in the Clerk's office of this court.

The record from the Circuit Court of Appeals for the Fourth Circuit did not reach the Clerk's office of this court until Saturday, May 20th, 1899, and has not yet been printed.

Upon this state of facts, we submit:

FIRST.

The notice thus served was not sufficient to afford the plaintiff in error opportunity for preparing and printing a proper brief in the premises.

Even if it were possible for counsel to abandon all other engagements and to concentrate every energy upon the preparation of such a brief, it would not be practicable to prepare and print it in the time given, especially in a case of such complexity and difficulty, as a glance at the record will demonstrate the case at bar to be.

SECOND.

The notice thus served was not all that might and should have been given by the defendant in error, after he was aware of the granting of the writ of error and supersedeas.

The order allowing the writ of error and supersedeas was entered May 4, 1899, the writ was awarded on the 5th, and the defendant in error was aware of its issue on the 6th instant; yet the first intimation which the plaintiff in error received of any disposition to contest the matter, or to move the dismissal or modification of the writ, was nearly twelve days later, *i. e.*, on the evening of the 17th of May. We submit that the *laches* of the defendant in error, in failing to give prompt notice of his intended motion, ought not to result in depriving the plaintiff in error of his right to sufficient time to prepare to resist the motion.

THIRD.

The notice thus served fails to comply with the regulations and requirements of this Honorable Court in the premises, to be found in Paragraph 4, of Rule 6, with regard to "Motions." The paragraph referred to is as follows:

"RULE 6, MOTIONS.

* * * * * * *

"4. WHEN TO BE SUBMITTED.—All motions to dismiss writs of error and appeals, except motions to docket and dismiss

under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases, except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days."

* * * * * * *

It is perhaps unnecessary to remark that the wide application and great importance of this rule are strongly and repeatedly emphasized in its phraseology. It applies to "all motions to dismiss appeals and writs of error," with a single exception under which the case at bar does not fall:—it requires that notice of the motion be served "at least three weeks before the time fixed for submitting the motion;" and this, "in all cases," with the exception of one specific case, in which "the notice shall be at least thirty days."

We submit that the notice in the case at bar is inevitably condemned by this rule as *illegal* and *insufficient;* and, furthermore, that this honorable court will never, without a hearing and substantially without notice, vacate, as improvidently awarded, a writ which was granted by a Circuit Judge of the highest intelligence, not upon a mere perfunctory, *ex parte*, inspection of the record, but after elaborate and repeated discussions of the case before him, and that, upon the very points covered by the pending motion.

Upon the basis hereinabove laid, we respectfully ask the postponement of the hearing to a future day—in order to afford the plaintiff in error time for preparation and full response to the brief submitted by the defendant in error in support of his motion.

And, if it be suggested, as it has been suggested by the de-

ndant in error in his said brief, that the exigencies of the ublic convenience and accommodation demand prompt action; ay it not be pertinently suggested, in reply, that it might be ell to have some regard, also, to what the public convenience, commodation and safety may require *in the direction of caution d deliberation*, in view of the allegations of the sworn answer the defendant railroad filed in the condemnation proceed- g—that the transcendently important use *for railroad purposes*, which the property in question was originally appropriated, ill be seriously menaced and interfered with by the proposed ondemnation and appropriation of said property *to telegraph rposes*, and also in view of the contention, that there is no atute now in force in North Carolina, by virtue of which ch condemnation and appropriation may lawfully be made.

Respectfully submitted,

ROBERT STILES,
ADDISON L. HOLLADAY,
Of Counsel for Plaintiff in Error.